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SCHOOL CHOICE¹ THROUGH VOUCHERS: DRAWING CONSTITUTIONAL LEMON-AID FROM THE LEMON TEST

"If an unfriendly foreign power had attempted to impose on America the mediocre educational performance that exists today, we might well have viewed it as an act of war."

1983 report by the National Commission on Excellence in Education²

INTRODUCTION

Rarely a day goes by without news coverage focusing on the poor condition of our nation's public school system.³ Americans

¹ The phrase "school choice" applies to many different types of program proposals designed to provide parents with the opportunity to select the school of their choice for their children. See PETER W. COOKSON, JR., *SCHOOL CHOICE: THE STRUGGLE FOR THE SOUL OF AMERICAN EDUCATION* 14-16 (1994). For purposes of this Note, the terms "school choice," "school choice/voucher," and "fully participating school voucher" programs are defined as follows:

School Choice Program - plans which permit students to cross district lines to attend schools. Parental choice is typically limited to public schools.

School Choice/Voucher Program - plans which permit students to cross district lines to attend schools. Parental choice is limited to public and private non-sectarian schools. A system of certificates (vouchers) or cash payments are made by the state to the selected school. The value of the payment is based on a fixed percentage of the local per-pupil cost of public education.

Fully Participating School Voucher Program - plans which permit students to cross district lines to attend schools. Parental choice is unlimited, allowing for selection of public, private non-sectarian, or private sectarian schools. This program utilizes the same system of funding as school choice/voucher plans.

² NATIONAL COMMISSION ON EXCELLENCE IN EDUCATION, *A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM* 5 (1983). President Ronald Reagan called for the establishment of a commission to review American public education. See 19 WEEKLY COMP. PRES. DOC. 592 (May 2, 1983) (transcribing president's remarks after receiving commission's final report). Former Education Secretary Terrel H. Bell established the eighteen member National Commission on Excellence in Education in 1981. *Government Panel Finds Decline in U.S. Education; Urges Action to Upgrade Schools*, FACTS ON FILE WORLD NEWS DIGEST, Apr. 29, 1983, at 310 A1. The commission issued the report after twenty months of research. *Id.*

³ See, e.g., *Charter Schools - New Model For Public Schools Provides Opportuni-*

have been inundated with startling statistics which illustrate the inefficiencies of many public school systems across the country.⁴

ties and Challenges, GAO REPORTS, Jan. 19, 1995 (report-number: GAO/HEHS-95-42 Jan. 18) (developing model charter school program to alleviate variety of concerns about public educational system); Raymond Hernandez, *Anti-tax Groups Fight School Budget Hikes*, COM. APPEAL (Memphis), Jan. 29, 1995, at 15A (indicating growing nationwide concern over increasing public school budgets and questionable school quality); *Keeping School Reform on Track*, PLAIN DEALER, Jan. 16, 1995, at 8B (calling for continued government support in raising standards and expectations for primary and secondary education); *Reforming Primary Education*, TIMES-PICAYUNE, Jan. 6, 1995, at B6 (pointing out reforms in Louisiana's public schools after 1993 report indicated widespread use of inappropriate teaching, testing, retention, and promotion practices for children grades K to 3); Peter Simon, *Teacher Training Assailed in Report; Panel Says University Programs Are Out of Touch With Public Schools*, BUFF. NEWS, Jan. 29, 1995, at 4 (indicating universities offering teaching degrees must take responsibility for dismal performance of our elementary and high schools); Jeannie Smith, *Why Johnny Can't Work: Faced with Graduates Who Can't Read, Write, or Reason, Business Steps Into the Classroom*, GREATER BATON ROUGE BUS. REP., Jan. 24, 1995, at 26 (revealing that Louisiana's public school students rank near bottom in most mathematics and science proficiency tests); Jennifer Talhelm, *State Education Leaders Call For Tougher Standards For Schools*, HERALD-SUN (N.C.), Jan. 13, 1995, at C1 (noting North Carolina's Governor call to raise standards and provide quality education in all North Carolina schools); Vanee Vines, *Replacing the Rules With Innovation; Experimental Schools are Public Education's Best Hope, Many Say*, VIRGINIAN-PILOT, Jan. 5, 1995, at A1 (suggesting that traditional public schools fail because neither students nor their parents have input or choice in school educational programs and goals); *Why Can't Joe College Read?; Increasing Numbers of Cal State Enrollees Need Remedial Work in Basic English and Math*, L.A. TIMES, Jan. 7, 1995, at B7 (stating that California public schools may be improving but are still graduating many students without basic skills); *Why Johnny Won't Stay In School*, BALTIMORE SUN, Jan. 9, 1995, at 6A (indicating one county school system has never achieved Maryland's state standard for dropout rates); David Woolsey, *Backers Believe Adoption of Charter Schools Can Change Education for the Better*, IDAHO STATESMAN, Jan. 8, 1995, at 1B (calling for charter schools to improve Idaho's public school performance).

⁴ "[T]he current inefficiency of spending on public schools is well documented. The United States already spends large sums per student relative to other ... countries, yet average test results for mathematics and science are poor" ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, OECD ECONOMIC SURVEYS: United States 52 Nov. 1993; see, e.g., Benjamin Akande, *Six Ways to Save Our Schools: It's Time to Set a National Goal-oriented Education Agenda to Improve Students' Performance, Create Incentives for Good Teaching, Re-evaluate the Curriculum, and Develop New Technology to Spur Learning*, USA TODAY (MAGAZINE), Nov. 1993, at 62 (stating nation's public education system has become "bureaucratic haven with lost priorities"); Terry Anderson, *When Schools Fail, We All Fail*, BUFF. NEWS, Oct. 12, 1995, at 3B (indicating Denver's public school system has no excuse for its inefficiency, poor achievement, and apathy); Andre Cline, *Money Won't Cure Education's Ills*, NEWS & RECORD (Greensboro, N.C.), Nov. 19, 1995, at F3 (indicating 1994 test results of North Carolina's eighth grade students revealed that five counties which had lowest per pupil expenditures produced 9.5% more students proficient in reading and 9.3% more proficient in mathematics). The North Carolina study suggested that increased expenditures on education have proven ineffective in

Public school budgets have grown rapidly, yet according to educational studies, the quality of education remains mediocre.⁵ In contrast, media attention surrounding private schools focuses on the schools' ability to provide better education with lower per-pupil costs.⁶ Responses to the apparent inequality between private and public school education have varied.⁷

raising students' performance in school "because the schools themselves are inefficient allocators of money." *Id.*; see James Dao, *Vermont Official is Picked as State Education Chief for New York*, N.Y. TIMES, Aug. 10, 1995, at B1 (stating that New York's Governor Pataki has indicated that New York State's Education Department is "symbol of bureaucratic bloat, inefficiency and aloofness"); *Funding Crisis?*, CHI. TRIB., Oct. 17, 1995, at 18 (stating Illinois' public schools are adequately funded but grossly inefficient); Joan Little, *Schools' Budget Gets a Demerit; City District Counters Group's Claim of "Bloated Central Bureaucracy"*, ST. LOUIS POST-DISPATCH, Sept. 26, 1995, at 1B (quoting local reform group, Project Appleseed, as stating "St. Louis Public Schools waste millions of dollars each school year because of a bloated central bureaucracy and inefficiently run schools...."); Jean Thompson, *College-Bound Steers Students the Right Way*, BALTIMORE SUN, July 6, 1995, at 1B (reviewing program that sends thousands of bright high school seniors to college from public school systems that are too overwhelmed, impoverished or inefficient to counsel them).

⁵ "[T]he amount spent on each pupil in America's schools has increased unabated for a century ... however, student performance has, at best, stayed constant and may have fallen." ERIC HANUSHEK ET AL., *MAKING SCHOOLS WORK: IMPROVING PERFORMANCE AND CONTROLLING COSTS* xvii-xviii (Brookings Inst. 1994). The author further details this phenomenon in a chapter entitled "Rising Expenditure, Falling Performance." *Id.* at 25-39. In fact, the United States Department of Education, National Center for Education Statistics reported that Washington, D.C., spent more money per pupil than any other school system in the country yet ranked last in mathematics and reading proficiency among all U.S. students. Cline, *supra* note 4, at F3.

⁶ See, e.g., Mike Bowler, *Catholic Schools: More For Less*, BALTIMORE SUN, Oct. 8, 1995, at 2C (indicating Maryland's Harford County public school system enrolls roughly same number of students as its Catholic school counterparts, yet spends twice as much on each student, has half as many schools and has central office staff nine times larger); Roger Harris, *Study Shows Economic Impact of Catholic Schools*, BUSINESS FIRST (Louisville), Apr. 18, 1994, at 1 (according to University of Louisville study, Louisville Catholic school system operates more efficiently than local public schools and saves local taxpayers potentially \$89 million per year); Little, *supra* note 4 (suggesting "Catholic schools are more efficient because their management is site-based ... parents, teachers and the principal make most decisions about what is taught in their schools"); *Private Schools Outperform Public Schools*, BUS./EDUC. INSIDER, June 1993, at 4 (noting that "[b]y grade 12, only 14 percent of public school students were at or above the '[p]roficient' level, compared with 22 percent of Catholic school students and 36 percent of all students attending other private schools"); *Around the U.S.A.*, ETHNIC NEWSWATCH, Sept. 30, 1995, at 29 (reporting that fewer than half of Milwaukee public school students graduate and only one-fourth go on to college, whereas 88% of Milwaukee private school students graduate and three-fourths go to college).

⁷ School reform initiatives across the country have taken many different approaches. See, e.g., Akande, *supra* note 4, at 62 (reviewing programs utilized

Federal and state legislatures are considering, or have already enacted legislation which supports charter schools, parental school choice, and school voucher programs.⁸ Since the "Goals 2000 Educate America Act"⁹ was signed into law, forty-four states have begun designing programs which will revamp their education systems by the next century.¹⁰ In some municipalities, local school officials have awarded contracts to school management companies to run the public schools.¹¹ In other cities,

throughout country to address school reform); Phil Linsalata, *School Project Promises Improvements*, SUNDAY GAZETTE MAIL (Charleston), Aug. 20, 1995, at 11A (noting privatization of four public school systems across country); *Ohio's Voucher Plan for Cleveland, First Program Approved in U.S. to Include Choice of Any Private School*, PR NEWswire, June 29, 1995, available in LEXIS, News Library, Wires File (indicating Ohio's Governor expected to sign law enacting fully participating school voucher program for Cleveland public school system); *Reforming Primary Education*, *supra* note 3, at B6 (noting that Louisiana has attempted to stimulate reform by increasing money available through competitive grants which enable state schools to better train teachers to monitor students' progress); Smith, *supra* note 3, at 26 (noting "adopt a school program" is providing needed money to Louisiana schools from corporate sources); Talhelm, *supra* note 3, at C1 (stating North Carolina's Governor is calling for educational boot camps, flexibility for schools to reduce considerably class size, and automatic expulsion for students found with weapons as methods to improve schools); Kathy Walt, *The 74th Legislature: Senate Passes Voucher Plan for Education; Private Schools in Program Could Receive Public Money*, HOUS. CHRON., Mar. 28, 1995, at A1 (stating Texas Senate overwhelmingly passed legislation allowing for school voucher program); Woolsey, *supra* note 3, at 1B (indicating answer to Idaho school reform is charter schools).

⁸ See, e.g., H.R. 1640, 104th Cong., 1st Sess. (1995) (calling for nationwide low income school choice demonstration program); H.R. 1828, 109th Leg., 1st Sess. (Ind. 1995) (introducing school voucher program for Indiana); H.R. 2200, 89th Leg., 1995-96 Sess. (Ill. 1995) (proposing amendment to school code to allow "cash scholarships"); S.R. 547, 117th Leg., 1st Sess. (Me. 1995) (proposing establishment of comprehensive school choice program using vouchers). Ohio and Wisconsin have enacted laws implementing fully participating school voucher programs. See 1995 Ohio Legis. Serv. L-809 - L-824 (Baldwin); 1995 Wis. Legis. Serv. Act 27, § 4002 (West) (to be codified at WIS. REV. CODE ANN. § 119.23 (West)) (amending § 119.23 to include sectarian schools).

Charter school legislation, however, has been more predominant. As of January 1995, there were 134 charter schools approved in nine of the eleven states with charter school laws. See, e.g., CAL. EDUC. CODE § 47605 (West 1995); COLO. REV. STAT. § 22-30.5-109 (1995); MASS. ANN. LAWS ch. 71, § 89 (Law. Co-op. 1995); N.M. STAT. ANN. § 22-8A-5 (Michie 1993). Additionally, a federal grant program was enacted to provide support for charter schools. See 20 U.S.C. §§ 8061-67 (1994).

⁹ Goals 2000: Educate America Act, 20 U.S.C. §§ 5801-5802 (1994). The purpose of the act is "to establish National Education Goals." *Id.* § 5811.

¹⁰ "Secretary [of Education] Riley pointed out that today, just 8 months after the 'Goals 2000 Educate America Act' was signed into law, 44 states are designing, from the bottom up, a better education system for the next century." 141 CONG. REC. S1863, 1877, (daily ed. Feb. 1, 1995) (statement of Sen. Kennedy).

¹¹ The Edison Project has contracted with Boston, Massachusetts, Wichita, Kan-

schools have received support for their growing budgets through large corporate grants.¹² Most recently, privately funded voucher programs have been implemented.¹³ School reform has become the buzz word of the nation and the reaction has created small pockets of change.¹⁴

There are both critics and supporters for all of the innovative proposals currently under consideration at the federal and state legislative levels.¹⁵ Proposals for charter schools,¹⁶ school

sas, Mount Clemens, Missouri, and Sherman, Texas to manage their public school systems. See Phil Linsalata, *supra* note 7, at 11A. The Edison Project intends to educate students using state of the art technology and innovative learning techniques. See Associated Press, *Edison Gets \$30 Million For Profit-Making Schools*, TIMES-PICAYUNE, Mar. 17, 1995, at C3. Analysts indicate that education represents a \$400 billion market and suggest it is "inevitable that for-profit firms" will enter the education market. See James K. Glassman, *It's Elementary: Buy Education Stocks Now*, WASH. POST, Jul. 2, 1995, at H1-H2. But see Jean Thompson, *School Board Urges Mayor to Drop EAI; Schmoke Is Advised to End Contracts this Academic Year; Cost at Center of Dispute; Private Company Has Managed 9 City Schools for 3 1/2 Years*, BALTIMORE SUN, Nov. 22, 1995, at 1A (reporting Baltimore school board's decision to fire Education Alternatives Inc., which was hired to manage schools). Reports from Miami and Hartford, cities which had also contracted with Education Alternatives Inc., indicated dissatisfaction with the cost and student test scores. Diane Scarponi, *School Firm Loses Last Public Client*, ROCKY MOUNTAIN NEWS, Jan. 28, 1996, at 32A (noting that Miami and Baltimore had severed ties with EAI in 1995 and that Hartford had now dismissed EAI, leaving company with no remaining public clients).

¹² See, e.g., Jeanne Allen & Michael J. McLaughlin, *A Businessman's Guide To The Education Reform Debate*, HERITAGE FOUND. REP., Dec. 21, 1990 (indicating IBM spent over \$42 million on education projects in 1988, AT&T spent \$18 million in 1990, and Chevron roughly \$9 million in 1990); Smith, *supra* note 3, at 26 (reporting that Exxon has actively participated in "Adopt a School Program" which allows business to help provide for education needs beyond what school system can provide).

¹³ "The private voucher movement, launched by the Golden Rule Insurance Company in Indianapolis [in 1991] continues to grow rapidly." *Private Voucher Programs Flourish*, BUS./EDUC. INSIDER, Nov. 1994, at 2. Fifteen major cities have established private voucher initiatives. *Id.*; see *infra* notes 80-91 and accompanying text (detailing private school voucher programs in effect).

¹⁴ See *supra* notes 7-13 and accompanying text (providing overview of school reform initiatives pending or implemented across nation).

¹⁵ Compare A. Phillips Brooks & Jeff South, *School-Choice Proposals Worry Resegregation Critics; Statistics Show Trend of Clustering of Minorities and Low-Income Students*, AUSTIN AM.-STATESMAN, Apr. 9, 1995, at A1 (indicating attorney for Mexican American Legal Defense and Educational Fund believes school choice programs could leave public schools more segregated than ever); and *Education Reform and School Choice: Hearings on H.R. 1640 Before the Subcomm. on Early Childhood, Youth and Families of the House Comm. on Economic and Educational Opportunities*, 104th Cong. (June 21, 1995) (testifying before committee, Barry W. Lynn, Executive Director of Americans for Separation of Church and State, indicated vigorous opposition to school tuition vouchers) with Clint Bolick, *Opinion*,

choice,¹⁷ privatization of schools,¹⁸ and school vouchers¹⁹ are

MILWAUKEE J. SENTINEL, July 28, 1995, at A11 ("Choice can provide the catalyst for long-overdue public school reform."); and Carol Innerst, *Wisconsin Church Schools Open with Vouchers in Use*, WASH. TIMES, Aug. 22, 1995, at A1 (quoting Susan Mitchell, public policy and education consultant commenting on benefits of Wisconsin's school voucher program as saying "Some of these kids who will be attending schools in their own neighborhoods for the first time, ... will be off the bus and in the community."). In addition, compare Jake Henshaw, GANNETT NEWS (Sacramento), Nov. 16, 1995 (indicating education experts are concerned that charter schools are operating under standards that are too lenient), and Doug Myers, *House Approves Bill on Charter Schools; Senate to Consider Amendments*, ADVOCATE, June 7, 1995, at 1B (indicating parents concern that charter school legislation requires only 75% of teachers at charter schools to be certified by state to teach), with Vines, *supra* note 3, at A1 (suggesting charter schools are "country's best hope for public education"), and Woolsey, *supra* note 3, at 1B (indicating charter schools are one of most dramatic ways to increase parent involvement in school operations).

¹⁶ See generally GAO REPORTS, *supra* note 3 (reviewing charter school legislation). Before a charter school can be created, the state's education law must be amended. *Id.* Charter schools are not encumbered by the rigid standards facing the public school systems. *Id.* A charter school has the freedom to create innovative curricula and class schedules in ways it believes will yield the greatest benefit for the students. *Id.* Although charter schools have more flexibility in their operation, the key to their success may lie in increased parent and student involvement. *Id.* The mission of most charter schools is not to create a place where middle school children are treated as already "washed up," but rather to challenge them and cultivate their spirits so they acquire a thirst for learning. See Vines, *supra* note 3, at A1 (reviewing charter school programs across country). Students enroll in charter schools by choice, creating an atmosphere in which parents, students, and teachers are willing to do whatever it takes to make sure every child comes away with a solid education. *Id.*

The nation's first charter school was opened in 1992 in a recreational center in the impoverished east side of St. Paul, Minnesota. *Id.* This year-round school currently enrolls 50 troubled students between the ages of 13 and 20. *Id.* The school's success is apparent when one considers that, in a time when traditional educational models appear to be failing, all but two students in its first graduating class, and all but one student in its most recent graduating class, have enrolled in post-secondary institutions. *Id.* Following Minnesota's lead, 18 other states have enacted laws which will enable communities to open charter schools. See, e.g., ALASKA STAT. § 14.03.250 (1995) (establishing charter schools in Alaska); CAL. EDUC. CODE § 47605 (Deering 1995) (establishing charter schools in California); N.M. STAT. ANN. § 22-8A-5 (Michie 1993). There is a great disparity, however, in these laws. See generally GAO REPORTS, *supra* note 3 (comparing all charter school laws as of January 1995). For example, Minnesota charter schools operate independently from the school district while Colorado charter schools are operated by the local public school district. *Id.*

¹⁷ See *supra* note 1 (defining school choice); see also, e.g., ARK. CODE ANN. § 6-18-206 (Michie 1995) (giving students opportunity to apply for admission to school in districts outside one in which they reside); MASS. ANN. LAWS ch. 76, § 12B (Law. Cop. 1995) (allowing students to cross district lines in choosing their schools as part of state's school choice program); 1995 N.Y. Laws 82, § 84 (allowing commissioner of education to approve school district applications for funding of development of pub-

gaining popularity among parents and students.²⁰ What does this mean for the future of our public school system? Probably nothing until the wall of resistance constructed by public schools is hurdled or removed, thereby giving some of these innovative, meritorious proposals the opportunity to be implemented nationwide.

Among the many proposals offered to improve the quality of the public education system, school voucher programs are emerging as a preferred option.²¹ Part I of this Note outlines and

lic school choice programs). See generally COOKSON, *supra* note 1, at 38-70 (overviewing school choice concept); MYRON LIEBERMAN, PUBLIC EDUCATION: AN AUTOPSY 299-302 (1993) (providing overview of reaction to school choice plan suggested by former Presidents Reagan and Bush).

¹⁸ Privatization of schools is a recent addition to the school reform movement. See, e.g., LIEBERMAN, *supra* note 17, at 318-27 (commenting on Edison Project entry into school reform initiatives). Under a privatization program, the public school system is managed and operated by a for-profit business under contract with the municipality. See Linsalata, *supra* note 7, at 11A (describing how Edison project functions); Bill Zlatos, *Privatizing Schools Tests a Pittsburgh Suburb*, N.Y. TIMES, Aug. 30, 1995, at B6 (discussing first instance in country where privatization plan called for replacement of unionized teachers with company employees); see also *supra* note 11 and accompanying text (discussing privatization programs currently in effect).

¹⁹ See *supra* note 1 (defining fully participating school voucher and school choice/voucher programs); see also WIS. STAT. § 119.23 (1994) (providing school choice/voucher program for low-income children attending Milwaukee school); 1995 Wis. Legis. Serv. 27 (West) (amending § 119.23 to include sectarian schools and thus creating fully participating school voucher program); 1995 Ohio Legis. Serv. 117 (Baldwin) (adopting fully participating school voucher program limited to low-income students attending school in Cleveland). See generally Henry M. Levin, *The Theory of Choice Applied to Education*, in 1 CHOICE AND CONTROL IN AMERICAN EDUCATION: THE THEORY OF CHOICE AND CONTROL IN EDUCATION 255-66 (William H. Clune & John F. Witte eds., 1990) [hereinafter CHOICE AND CONTROL] (reviewing varying educational voucher mechanisms).

²⁰ See, e.g., Dale D. Buss, *Payday For Vouchers? School Choice Remains Popular Idea, But Public Education Activists See a Grave Threat*, CHRISTIANITY TODAY, Oct. 23, 1995, at 76 (noting that November 1994 elections revitalized voucher movement because many anti-choice Democrats in state legislatures were not reelected); Vines, *supra* note 3, at A1 (quoting charter school student saying "I like it here ... because it's smaller and they try to teach you more. I feel like everyone really wants to succeed."); *High Marks For Wisconsin Scholarship Program*, HERITAGE FOUND. REP., Oct. 1995, at 2 [hereinafter, *High Marks*] ("The overwhelming majority of parents were satisfied with the performance of the schools.").

²¹ See Buss, *supra* note 20, at 76 (indicating choice programs provide parents with opportunity to choose among schools); Maria Koklanaris, *Fairfax County to Hold Hearing on School Choice*, WASH. TIMES, Oct. 21, 1993, at C5 (citing national survey polls indicating 69% of parents favor school choice plans which include public, private and parochial schools); Mary Ellen Leary, *This Voucher Defeat is the Start of Reform*, CHIC. TRIB., Nov. 10, 1993, at 31 (noting defeat of California's school voucher program represents beginning of national push for parental school choice); JOEL SPRING, AMERICAN EDUCATION: AN INTRODUCTION TO SOCIAL AND

explains the basic structure of a school voucher program. The outline highlights current proposals both in Congress and in state legislatures which call for the implementation of school voucher programs, and discusses the status of the only voucher program currently operating in this country. Part II addresses the constitutional issues raised by school voucher programs, specifically challenges under the First Amendment's Establishment Clause, and argues that school vouchers can withstand such challenges. Part III demonstrates why school vouchers will work in reforming our public schools and discusses the criticisms levied against these programs.

I. SCHOOL VOUCHER PROGRAMS: PROVIDING FREEDOM OF CHOICE

School voucher programs would allow parents to choose where to send their children to school.²² A voucher program would empower the parents of public school students with the freedom to select an alternative school.²³ Under the program, parents would receive a voucher, redeemable at participating schools, to fund the cost of their child's education.²⁴ The state

POLITICAL ASPECTS 162 (1991) (noting choice/voucher programs give parents options in selection of their child's school). See generally JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS & AMERICA'S SCHOOLS* (1990) (detailing structure of school/choice voucher programs and their utility in public school reform); Philip T.K. Daniel, *A Comprehensive Analysis of Educational Choice: Can The Polemic of Legal Problems Be Overcome?*, 43 DEPAUL L. REV. 1, 3-9 (1993) (providing history of parental choice and voucher concept).

²² See COOKSON, *supra* note 1, at 16 (stating vouchers are funding mechanisms which enable public school students to attend any school of their choice); Judith Areen & Christopher Jencks, *Education Vouchers: A Proposal for Diversity and Choice*, in EDUCATIONAL VOUCHERS: CONCEPTS AND CONTROVERSIES 49, 51 (George R. La Noue ed., 1972) ("[P]arents could take this voucher to any school which agreed to abide by the rules of the voucher system.").

²³ See Areen & Jencks, *supra* note 22, at 50 ("[Without vouchers] only relatively affluent parents retain any effective control over the education of their children. Only they are free to move to areas with 'good' public schools ... [and only they can afford nonsectarian private schooling.]; John E. Coons & Stephen D. Sugarman, *Vouchers For Public Schools*, in 15 INEQUALITY IN EDUCATION 60 (1973) (claiming that vouchers offer choices to parents between public and private schools).

²⁴ See generally Areen & Jencks, *supra* note 22 (providing overview of standard voucher programs, which provide parents with voucher redeemable at any participating school); Levin, *supra* note 19, at 257 (overviewing financial component of voucher programs); John E. Coons & Stephen D. Sugarman, *Educational Tax Credits Versus School Vouchers: Comment on the California Tuition Tax Credit Proposal*, in FAMILY CHOICE IN SCHOOLING: ISSUES AND DILEMMAS 169, 169-70 (Michael E. Manley-Casimir ed., 1982) [hereinafter FAMILY CHOICE] (indicating that voucher

would provide the voucher, the value of which is fixed and typically based on some percentage of the per-pupil public school attendance cost.²⁵ A fully participating voucher program²⁶ would enable parents to redeem the voucher at any public or private school—non-sectarian or sectarian—that chooses to participate in the program.²⁷ In contrast, a school choice/voucher program would limit participation to public and non-sectarian private schools only.²⁸ If the voucher is redeemed at a public school, no further tuition payment would be due;²⁹ however, further tuition payments may be required if redemption is at a private school.³⁰

Wisconsin was the first state to enact legislation implementing a school voucher program.³¹ The original legislation adopted

plan would give scholarship worth its face value to both participating family and selected school).

²⁵ See WIS. STAT. § 119.23(4) (1994) (determining voucher value from public school per pupil cost); COOKSON, *supra* note 1, at 16 (indicating voucher has fixed value); LIEBERMAN, *supra* note 17, at 156 (“Many voucher proposals base the amount of the voucher on per-pupil costs in public schools.”); Coons & Sugarman, *supra* note 24, at 169-70 (indicating voucher value is percentage of money spent on children in public schools).

²⁶ See *supra* note 1 (defining fully participating voucher program for purposes of this Note). Wisconsin and Ohio are the only two states that have enacted laws providing for fully participating voucher programs. See 1995 Wis. Legis. Serv. 27 § 4002 (West); 1995 Ohio Legis. Serv. 117 § 3813.976 (Baldwin). Pending federal legislation also provides for a fully participating voucher program. See H.R. 1640, 104th Cong., 1st Sess. (1995).

²⁷ See COOKSON, *supra* note 1, at 16 (defining voucher program as “system of certificate or cash payments by the government that enables public school students to attend schools of their choice, public or private”). Wisconsin’s revised “Milwaukee Parental Choice Program” and Ohio’s newly adopted “Scholarship Program” allow all schools—public, private, sectarian, and nonsectarian—to participate in the voucher program. See 1995 Wis. Legis. Serv. 27 § 4002 (West) (deleting from § 119.23(2)(a) “nonsectarian” restriction on private schools eligible to participate); 1995 Ohio Legis. Serv. 117 § 3313.976(A) (Baldwin) (describing private school requirements for participation in program, not limited to nonsectarian schools).

²⁸ See *supra* note 1 (defining school choice/voucher program). The original Milwaukee Parental Choice Program limited the participating schools to public and private nonsectarian schools. See WIS. STAT. § 119.23(2)(a) (1994).

²⁹ See WIS. STAT. § 119.23 (1994) (addressing funding for participating private schools only, participating public schools continue to receive funding as they do under existing education law).

³⁰ See 1995 Ohio Legis. Serv. 117 § 3313.976(8) (Baldwin) (limiting participating private schools to charges of maximum of 10% of voucher amount for tuition). *But see* WIS. STAT. § 119.23(2)(a) (1994) (allowing eligible students to attend any participating school “at no charge”); 1995 Wis. Legis. Serv. 27 § 4002 (West) (leaving “at no charge” provision).

³¹ WIS. STAT. § 119.23 (1994) (establishing “Milwaukee Parental Choice Program” which enables parents to send their children to any public school or private non-sectarian school of their choice).

was a school choice/voucher program enabling parents to cross district lines to enroll their children in any public or non-sectarian private school of their choice.³² The original law established the Milwaukee Parental Choice Program ("MPCP"),³³ and stated "any pupil in grades kindergarten to 12 who resides within the city [of Milwaukee] may attend, at no charge, any non-sectarian private school located in the city."³⁴ To participate in the program, a student's family income could not exceed 1.75 times the poverty level as determined under federal law.³⁵ Religious schools were not eligible to participate in the program.³⁶ Once a child was enrolled, the parents or guardians were required to submit proof of enrollment to the State Superintendent.³⁷ Upon receipt of such proof, the Superintendent authorized tuition payments directly to the private school.³⁸ The Wisconsin Legislature appropriated funds which flowed directly from the state treasury to the private school.³⁹

The original Wisconsin statute survived challenges under the Wisconsin Constitution as well as the United States Constitution.⁴⁰ In May of 1995, the Wisconsin Legislature's Joint Fi-

³² § 119.23(2)(a) ("[a]ny pupil in grades kindergarten to 12 who resides within the city may attend, at no charge, any nonsectarian private school located in the city").

³³ See WIS. STAT. § 119.23.

³⁴ § 119.23(2)(a).

³⁵ § 119.23(2)(a)(1).

³⁶ § 119.23(2)(a) (limiting participating private schools to nonsectarian schools).

The 1995 amendments expanded the program to include sectarian private schools. See 1995 Wis. Legis. Serv. 27 § 4002 (West) (deleting nonsectarian restriction).

³⁷ WIS. STAT. § 119.23(3) (1994).

³⁸ § 119.23(4).

³⁹ *Id.*

⁴⁰ See *Davis v. Grover*, 480 N.W.2d 460, 477 (Wis. 1992) (holding MPCP did not violate Wisconsin Constitution); *Miller v. Benson*, 878 F. Supp. 1209, 1216 (E.D. Wis.), *vacated*, 68 F.3d 163 (7th Cir. 1995) (holding that MPCP did not violate First Amendment's Establishment Clause by not including religious schools in choice program). In *Miller*, the issue before the District Court was whether the MPCP "which reimburses private *nonreligious* schools for the tuition of eligible children, must also reimburse private *religious* schools for the tuition of similarly situated children." *Id.* at 1210. The court held that "[t]he present state of First Amendment law compels this court to hold that the plaintiff's request to expand the Current Choice Program [MPCP] to make tuition reimbursements directly payable to religious private schools who admit eligible [MPCP] schoolchildren would violate the Establishment Clause." *Id.* at 1216. The *Miller* court indicated that the critical issue under Establishment Clause analysis is whether the benefits of the program were made available to "all parents" or to a selected group, i.e. "only to parents of children in *non-public* schools." *Id.* at 1215 (quoting *Mueller v. Allen*, 463 U.S. 388, 398-99 (1983)).

nance Committee voted to expand and transform the state's "school choice" program⁴¹ to include private sectarian schools, thereby creating a fully participating voucher program.⁴² The bill was enacted in July of 1995.⁴³ Under the revised legislation, the percentage of Milwaukee students allowed to participate in the program was increased to fifteen percent.⁴⁴ Additionally, under the revised program, the voucher would be issued in the parents' name and then sent directly to the participating school of choice.⁴⁵ The parents authorize tuition payment to the school by endorsing the check.⁴⁶

Immediately after the revisions took effect, the legislation was challenged as violative of the Establishment Clause of the First Amendment of the United States Constitution.⁴⁷ In response to the challenge, the Wisconsin Supreme Court issued a temporary injunction preventing the state from sending any funds under the MPCP to any participating sectarian school.⁴⁸ A

⁴¹ See H.R. 1266, 91st Legis., Reg. Sess. (Wis. 1993-94) (proposing modifications to choice program to include sectarian schools).

⁴² 1995 Wis. Legis. Serv. 27 § 4002 (West) (deleting word "nonsectarian" from description of participating private school in WIS. STAT. §119.23(2)(a)). See *supra* note 1 (defining fully participating voucher program).

⁴³ See 1995 Wis. Legis. Serv. 27 § 4002 (West).

⁴⁴ H.R. 1266, 91st Leg., Reg. Sess. (Wis. 1993-94) (amending WIS. STAT. § 119.23(2)(b) which allowed only 1% student participation).

⁴⁵ 1995 Wis. Legis. Serv. 27 § 4006m (West) (amending WIS. STAT. § 119.23(4) to instruct education department to send check to private school and then parent "shall restrictively endorse the check for the use of the private school").

⁴⁶ *Id.*

⁴⁷ See, e.g., Carol Innerst, *Wisconsin Hires Starr to Defend School Plan; Vouchers for Religious Schools Under Fire*, WASH. TIMES, Aug. 15, 1995, at A4 (indicating "American Civil Liberties Union responded first with a lawsuit challenging the constitutionality of the expanded program"); Cary Segall, *Court Hears "Choice" Arguments; Constitutionality of Payment Program for Poor Pupils Turns on Religious Issue*, WIS. STATE J., Aug. 24, 1995, at 1B (indicating that Wisconsin Supreme Court heard arguments on constitutionality of MPCP).

⁴⁸ See, e.g., Joel Dresang, *Business Puts Its Money Behind Support for Choice*, MILWAUKEE J. SENTINEL, Sept. 1, 1995, at B1 (noting Wisconsin's high court delayed dispersal of state money to religious schools while court considered constitutional challenges); *Wisconsin Private Philanthropists Support Choice*, BUS./EDUC. INSIDER, Oct. 1995, at 2 [hereinafter *Private Philanthropists*] (indicating Wisconsin Supreme Court issued injunction halting program's inclusion of religious schools). As a result of the injunction, business and private donations have been collected totaling more than \$1.8 million to help give the children of Milwaukee the ability to stay in their school of choice. *Id.*

The Wisconsin Senate, anticipating the possible nullification of the amended law, has introduced a bill repealing the inclusion of sectarian schools in the MPCP. See S.R. 424, 92nd Legis., Reg. Sess. (Wis. 1995-96).

final decision is expected soon.⁴⁹ Analysts predict that irrespective of the Wisconsin Supreme Court's holding, a writ of certiorari will be made to the United States Supreme Court.⁵⁰ If, however, the Wisconsin Supreme Court bases its decision solely on the Wisconsin Constitution, advocates for the program will have little opportunity for appeal.⁵¹

At the federal level, proposed public school reform legislation includes a bill to establish a low-income school voucher program.⁵² The Low-Income School Choice Demonstration Act of 1995 would provide financial assistance to low-income parents, thereby allowing them to "select the public or private schools their children will attend."⁵³ The purpose of the program is to

⁴⁹ See *Private Philanthropists*, *supra* note 48 (indicating attorney supporting students anticipates decision by end of year).

⁵⁰ *Id.* (quoting Landmark Legal Foundation of Kansas City, Missouri) ("[T]he Milwaukee school choice litigation will ultimately result in a major U.S. Supreme Court decision"); see Richard P. Jones, *Some Say Battle Could End With Wisconsin Supreme Court Ruling*, MILWAUKEE J. SENTINEL, Sept. 18, 1995, at 5 (indicating that when Wisconsin Governor signed amended legislation he expected U.S. Supreme Court to ultimately decide case).

⁵¹ See Jones, *supra* note 50 (commenting that decision under Wisconsin's Constitution would preclude opportunity for appeal by advocates of program). The language of the Wisconsin Constitution is more restrictive than that of the United States Constitution's First Amendment. *Id.* Article I, Section 18 of the Wisconsin Constitution states:

The right of every person to worship Almighty God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend, erect or support any place of worship, or to maintain any ministry, without consent; nor shall any control of, or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishments or modes of worship; nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.

WIS. CONST. art. I, § 18.

Political science professor at Marquette University, Christopher Wolfe, has stated:

The state Supreme Court has tied the Wisconsin religious provisions of the constitution pretty closely to the religious provisions of the federal constitution If they stick by precedent, [Governor] Thompson's going to win If they decide to read the difference between the two constitutions more sharply, then on that ground, they might strike down school choice.

Jones, *supra* note 50. Gordon Baldwin, constitutional law professor at the University of Wisconsin-Madison, indicated that if the court should invalidate the program, the governor could raise an equal protection issue in a federal appeal. *Id.* "[D]enying freedom of choice to parents, denies equal protection in an area where parents have an interest in deciding how to educate their children." *Id.*

⁵² See H.R. 1640, 104th Cong., 1st Sess. (1995) (introducing bill entitled "Low-Income School Choice Demonstration Act of 1995").

⁵³ *Id.* § 2.

enable Congress to determine the effects of school choice on participating students and schools.⁵⁴ The bill would establish between ten and twenty school choice programs across the country,⁵⁵ providing low-income parents with an education certificate for the cost of enrolling their eligible children in a choice school.⁵⁶ The amount of the certificate should be sufficient to provide recipients with the maximum degree of choice in their school selection.⁵⁷ The certificate amount, however, cannot exceed the current local, per-pupil, public school expenditure.⁵⁸

At the state level, there is an abundance of proposals for school choice/voucher and fully participating voucher programs.⁵⁹ Recently, the Connecticut legislature rejected a bill that would have established a fully participating school voucher program.⁶⁰ This rejection followed the defeat of the largest effort to enact a fully participating school voucher program, California's Proposition 174.⁶¹ Proposition 174, a state-wide proposal which was in-

⁵⁴ *Id.* (stating that purpose is to evaluate effect of choice in schooling by providing financial assistance to low-income parents).

⁵⁵ *Id.* § 5(b)(1) (stating that "Secretary [of Education] shall award grants to eligible [education providers] to enable such [providers] to carry out at least 10, but not more than 20, demonstration projects ...").

⁵⁶ *Id.* A "choice school" is defined as any public or private, including sectarian, school involved in a demonstration project. H.R. 1640, 104th Cong., 1st Sess. § 3(1) (1995). The term "low-income parent" is not formally defined in the bill. *See id.* § 3.

⁵⁷ *Id.* § 8(a)(1).

⁵⁸ *Id.* § 8(c).

⁵⁹ *See, e.g.,* S.R. 657, 179th Gen. Ass., Reg. Sess. (Pa. 1995-96) (proposing pilot tuition grant program for students to attend public schools selected by parents); H.R. 655, 89th Gen. Ass., Reg. Sess. (Ill. 1995-96) (proposing school choice/voucher law for state of Illinois); S.R. 547, 117th Leg., 1st Reg. Sess. (Me. 1995) (proposing comprehensive school choice program); S.R. 55, 42nd Legis., 1st Sess. (N.M. 1995) (proposing school choice/voucher program for New Mexico); H.R. 2754, 75th Leg. Sess., Reg. Sess. (Kan. 1993-94) (proposing school choice/voucher act); A.B. 400, 206th Leg., 1st Reg. Sess. (N.J. 1994) (proposing school choice pilot program for pupils residing in certain school districts); H.R. 2362, 178th Gen. Ct., Reg. Sess. (Mass. 1993) (proposing school choice/voucher act); H.R. 91, 73rd Leg. Sess., 1st Reg. Sess. (Tex. 1993) (proposing fully participating school voucher program for Texas).

⁶⁰ S.R. 310, Reg. Sess. (Conn. 1995); H.R. 5891, Reg. Sess. (Conn. 1995) (proposing fully participating school choice program for Connecticut); *see also* 3 STATE CAPITOLS REPORT 26 (1995) (indicating that proposed private school tuition voucher plan did not pass).

⁶¹ March Fong Eu, Secretary of State of California, *California Ballot Pamphlet: Special Statewide Election*, Nov. 2, 1993, at 32 (1993). *See generally* Cynthia Bright, *The Establishment Clause and School Vouchers: Private Choice and Proposition 174*, 31 CAL. W. L. REV. 193 (1995) (analyzing constitutionality of Proposition 174 under Establishment Clause, as well as policy arguments both for and against proposition). The proposal attempted to amend Article IX of California's Constitution to in-

cluded as a ballot item in the 1993 election,⁶² offered an educational scholarship for every resident, school-aged child in California.⁶³ Scholarships were redeemable at any scholarship-redeeming school, which included public, private, and sectarian schools that met minimal non-discriminatory requirements.⁶⁴ Proposition 174 was overwhelmingly defeated.⁶⁵

Despite limited success at the state level, school voucher programs are increasing in popularity.⁶⁶ At least a dozen states have voucher program initiatives pending.⁶⁷ One might ask why.

clude the "Parental Choice in Education Amendment." *Id.* at 231 (including text of proposed law stating "[a]ll parents are hereby empowered to choose any school, public or private, for the education of their children ...").

⁶² *Id.* at 194 ("[Proposition 174] offered the purest test for the popularity of a radical voucher program because of its state-wide scope ..."). The Excellence through Choice in Education League procured signatures to qualify the "Parental Choice in Education" initiative for the election ballot. *Id.* at 201.

⁶³ "The State shall annually provide a scholarship to every resident school-age child." *Id.* at 231 (quoting Proposition 174 § 17(a)).

⁶⁴ Bright, *supra* note 61, at 231 (noting that Proposition 174 § 17(a) empowered parents with scholarships redeemable at any participating school). Proposition 174 defined "scholarship-redeeming school" as any public or private school in state of California. *Id.* at 234 (quoting Proposition 174 § 17(d)(7)).

⁶⁵ See *id.* at 201 (noting that Proposition 174 was voted down by 70%); see also Mary Ellen Leary, *This Voucher Defeat Is the Start of Reform*, CHI. TRIB., Nov. 10, 1993, at 31 (arguing that result of vote was less important than its effect of moving vouchers into center of political debate); Peter H. King, *On California: Readin' and Writin' and Revolution*, L.A. TIMES, Nov. 7, 1993, at A3 (discussing identity and motivations of those who supported Proposition 174).

⁶⁶ See, e.g., Meg James, *Tuition Vouchers In Lawmakers' Curriculum*, PALM BEACH POST, Nov. 20, 1995, at 1A (indicating that Florida lawmakers have begun filing voucher bill legislation); Buss, *supra* note 20, at 76 (indicating national movement of lawmakers responding to parent's demands for school voucher programs); Ed Rauchut, *School Vouchers Gain Momentum*, OMAHA-WORLD-HERALD, Oct. 29, 1995, at 13B (stating that "school choice is on a roll"); Joan Walsh, *S.F. Schools at the Crossroads; Dialogue About Race, Class and Public Education Long Overdue*, S.F. EXAMINER, Nov. 7, 1993, at D1 (predicting that despite defeat of Proposition 174, "voucher movement will ultimately prevail").

⁶⁷ See *supra* note 59 (listing states which already have proposed school choice/voucher legislation). Wisconsin and Ohio are the only two states that have passed legislation implementing a fully participating school voucher pilot program. See 1995 Wis. Legis. Serv. 27 (West); 1995 Ohio Legis. Serv. 117 § 8313.976 (Baldwin). The laws in both states provide for a voucher program for selected municipalities. WIS. STAT. § 119.23 (1994) (limiting program to students residing within Milwaukee city limits and attending non-sectarian schools); 1995 Ohio Legis. Serv. § 3313.975 (Baldwin) (describing pilot scholarship program for Cleveland school district, which would allow certain number of students to attend "alternative" schools). Wisconsin is the only state to have an operating school choice/voucher program. See *supra* note 31 (indicating program in effect since 1990). The Wisconsin Supreme Court has enjoined Wisconsin's amended legislation. See *supra* note 48. The Ohio legislation is scheduled to take effect for the 1996-97 school year. See Scott

School voucher programs are considered to be a logical solution to public school reform. They are vigorously opposed, however, by public school special interest groups such as the National Education Association ("NEA").⁶⁸ These organizations have allocated significant resources to lobby against the proposals.⁶⁹ In contrast, most supporters of voucher programs are parents with limited financial resources.⁷⁰ Some school choice advocates view voucher programs as a way to break the public school system's monopoly.⁷¹ They contend that school voucher programs would create a competitive environment which would ultimately result in better education for both the private and public school stu-

Stephens, *School Voucher Deadline Nears*, PLAIN DEALER, Nov. 18, 1995, at 4E.

⁶⁸ See, e.g., JEFFREY R. HENIG, *RETHINKING SCHOOL CHOICE: LIMITS OF THE MARKET METAPHOR* 66 (1994) (indicating that NEA, among other educational interest groups, is opposed to voucher programs); LIEBERMAN, *supra* note 17, at 337 (indicating that at NEA convention, California's Teacher Association President stated, "We decided to create an organized campaign to block [Proposition 174] from getting enough signatures to qualify for the ballot."); Bright, *supra* note 61, at 202 (indicating seven major education organizations opposed Proposition 174); *Voucher Wars*, DETROIT NEWS, Sept. 12, 1995 (editorial) (stating that American Civil Liberties Union claimed Wisconsin's voucher program violated First Amendment separation of church and state); Buss, *supra* note 20, at 76 (indicating that NEA is considering lodging court challenge against Ohio choice program); Jean Merl, *Colorado is Battleground for School Voucher System; Education: Both Sides Are Bringing in Their Big Guns Over a Ballot Initiative that Would Provide Tax Dollars for Parents Who Want To Choose Non-Public Institutions*, L.A. TIMES, Oct. 26, 1992, at A3 (noting that local and national public school establishment groups have lobbied against Colorado's school voucher initiative); *School Choice*, WASH. TIMES, Mar. 25, 1995, at A5 (noting teacher unions and civil liberties groups plan to resist proposed federal school voucher program).

⁶⁹ See, e.g., LIEBERMAN, *supra* note 17, at 332 (indicating that California's Teachers Association raised \$10 million to fight Proposition 174); *School Choice: Parents Deserve the Freedom to Pick Best Schools for Kids*, CINN. ENQUIRER, Mar. 5, 1995, at H2 (noting opposition to choice is "fierce" and NEA spent \$12 million to defeat Proposition 174).

⁷⁰ See, e.g., Buss, *supra* note 20, at 76 (noting that parents are worried about their lack of influence over their children's education); Ellen Debenport, *School Vouchers on Trial*, TIMES UNION, Nov. 5, 1995, at E1 (quoting low-income parent in Milwaukee disappointed by halt in newly amended choice program).

⁷¹ See, e.g., HANUSHEK, *supra* note 5, at 103 ("Most public schools effectively have a local monopoly; parents living in a certain area have no choice over which school their children attend. Giving parents and students the ability to choose ... [will] effectively give them, rather than school administrators, the power to define a 'good' education and to shape the schools accordingly."); HENIG, *supra* note 68, at 59-64 (discussing public monopolies and how voucher programs can create competitive market); Areen & Jencks, *supra* note 22, at 51 ("A voucher system seeks to free schools from the restrictions which inevitably accompany their present monopolistic privileges.").

dent.⁷² Competition is the core of the nation's economy and the reason why consumers receive better products, lower prices, and a *choice* of services and products.⁷³

⁷² See, e.g., COOKSON, *supra* note 1, at 20-37 (providing history of choice movement and underlying competition theory); HENIG, *supra* note 68, at 78 (quoting former President George Bush, "It's time parents were free to choose the schools that their children attend. This approach will create the competitive climate that stimulates excellence in our private and parochial schools as well."); LIEBERMAN, *supra* note 17, at 10-14 (indicating system of educational vouchers is one alternative that can create competitive market system in education); Milton Friedman, *The Role of Government, in* EDUCATIONAL VOUCHERS, *supra* note 22, at 9 (indicating competitive market theory in education would result in more opportunity for quality education); Levin, *supra* note 19, at 247, 255 (citing philosophers and economists such as Adam Smith, Thomas Paine, and Milton Friedman and their arguments in favor of market system of education); see also Peter Buttress, *School-Choice Issue Debated; Panelists Discuss Pros and Cons at Manchester Forum*, HARTFORD COURANT, Nov. 14, 1995, at B1 (quoting advocate of school choice as stating "[m]onopolies are inefficient, ineffective, and unresponsive to the needs of consumers ... Even in the presence of abject failure in our inner-city schools, competitors are prohibited from offering an alternative."); Stanley Moss, *School Vouchers—Will they save or destroy public education?*, CAL. J., Jun. 1, 1992 (citing Milton Friedman, Adam Smith, and Thomas Paine as early proponents of educational voucher concept as means of infusing competitive market effects into educational system); Dane Smith & Patricia Lopez Baden, *Brandl-Weber Report Calls for Change in Budgeting Philosophy*, STAR TRIB., Nov. 14, 1995, at 1A (indicating that new plan for Minnesota's government calls for transformation of "state and local governments from monopoly producers of services to financiers or arrangers of those services"—including school voucher program to create competition from private and nonprofit groups).

⁷³ See MARSHALL C. HOWARD, *LEGAL ASPECTS OF MARKETING* (1964) (discussing laws which open free competition and private enterprise). Mr. Howard expressed the contemporary rationale of the positive effects of free competition as:

The producer-seller must satisfy the customers' wants. To do this he must know the customers' wants and be able to satisfy them as well as or better than business rivals can. Competition can be in terms of price, quality, nature of the product or service, or conditions of sale. The successful producer-seller is the one who has been most skillful in researching the buyers' wants, in procuring the resources to satisfy those wants, in making the goods available in desired form to the users, and in promoting sales. Other things being equal, this is accomplished by offering the best-quality goods at the lowest prices and on the most convenient terms of sale and delivery. Competition forces the business rivals to provide the best for the least. The efficient firms will be profitable and survive; the inefficient will not.

Id. at 1-2.

Cf. MALCOLM GETZ & DONALD S. WATSON, *PRICE THEORY AND ITS USES* 299-324 (5th ed. 1981) (discussing interplay between competition and economic welfare in purely and partially competitive markets); Fredric J. Entin, et al., *Hospital Collaboration: The Need For An Appropriate Antitrust Policy*, 29 WAKE FOREST L. REV. 107, 126 (1994) (quoting Anthony E. Harris, *Government's Closing Argument in Carilion Health Sys.*, 16 U.S. Dep't of Justice 1636-37) ("[C]ourts, like Congress, have said that the backbone of this economy is competition, and there should be very, very compelling reasons for destroying competition...").

The goal of the drafters of the MPCP is consistent with the theory underlying school voucher programs—a competitive market place in education will foster public school reform.⁷⁴ Milwaukee public schools are in need of reform and the legislature is convinced that school vouchers are the solution.⁷⁵ A 1995 survey conducted by the University of Wisconsin at Madison supports the legislature's view.⁷⁶ The survey revealed that 31.4% of all Milwaukee public school teachers—"who are required by condition of employment to live within the city limits—enroll[ed] their own children in private schools."⁷⁷ The survey also indicated that 44.5% of the public school teachers residing in Milwaukee's Central City neighborhoods selected private schools for their children.⁷⁸ These statistics clearly indicate a "'no confidence' vote in urban public education by the people who know it best."⁷⁹

Society's position on school voucher programs is reflected by the rise in privately funded versions.⁸⁰ A private voucher pro-

⁷⁴ See Amy Stuart Wells, *Education; Milwaukee Parents Get More Choice on Schools*, N.Y. TIMES, Mar. 28, 1990, at B9 (quoting Wisconsin Governor Tommy Thompson, "Choice gives poor students the ability to select the best school that they possibly can... The [Milwaukee Parental Choice Program] allows for choice and competition, and I believe competition will make both the public and private schools that much stronger."); EDUC. WEEK, Mar. 28, 1990 (quoting bill sponsor Annette Williams, state representative, "[w]e're now going to show that our children can be educated successfully for less than half the money that the Milwaukee schools use to miseducate our students"). But see Jim Hilton, Note, *Local Autonomy, Educational Equity and Choice: A Criticism of a Proposal to Reform America's Education System*, 72 B.U. L. REV. 973, 987 (1992) (conceding that competition may augment quality of education offered to some, but maintaining that if competition has effect of driving down quality of education for others, it will be unconstitutional).

⁷⁵ See *supra* note 74; COOKSON, *supra* note 1, at 66-67 (noting sponsor of bill's motivation for legislation was attempt to improve Milwaukee's public schools); LIEBERMAN, *supra* note 17, at 10-11 (indicating that supporters of educational vouchers believe that voucher system will foster competition and improve schools); Janet Weiss, *Control in School Organizations: Theoretical Perspectives*, in CHOICE AND CONTROL, *supra* note 19, at 112 (indicating advocates of Milwaukee choice program hope that "breaking the monopoly of the local public school will lead schools to be more responsive to parental concerns and preferences").

⁷⁶ See Daniel McGroarty, *Teacher Knows Best*, NAT'L REV., Sept. 25, 1995 at 62, 63 (citing to University of Wisconsin at Madison's Applied Population Laboratory survey).

⁷⁷ *Id.* at 62 (noting that percent enrolled in private schools was more than three times national average).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ See, e.g., COOKSON, *supra* note 1, at 41 (indicating Pat Rooney of Golden Rule Insurance Co., organized \$1.5 million private scholarship program for low-income children in 1991); *Private Voucher Programs Flourish*, *supra* note 13 (indicating

gram is one in which funding for the voucher is derived from private donations.⁸¹ The private voucher movement was launched three years ago in Indianapolis and has continued to grow rapidly.⁸² Privately funded programs circumvent the legal issues which surround publicly funded voucher programs.⁸³ Furthermore, private voucher programs avoid the wrath of public school interest groups which fight the implementation of publicly funded voucher programs.⁸⁴ Over twenty metropolitan cities across the nation have established privately funded voucher programs.⁸⁵ To date, more than 10,000 children are able to attend

that Golden Rule Insurance Co.'s program continues to grow rapidly); Ed Carson, *Going Private: Trends*, REASON, Nov. 1994, at 16 (indicating that San Antonio's Children's Educational Opportunity Foundation is operating privately funded voucher program); Judith Cebula & Rebecca Buckman, *Local Businesses Give \$1.3 Million to Catholic Schools; Money Will Help Fund Scholarships for Kids in 8 Inner-City Schools*, INDIANAPOLIS STAR, Oct. 31, 1995, at E1 (noting that \$1.3 million in corporate donations were given to fund scholarships at 8 Indianapolis central-city Catholic elementary schools); Michael P. Garber, *Time to Ring the Bell for School Reform*, SAN DIEGO UNION-TRIB., Feb. 5, 1995, at G1 ("The success of the 11 privately funded voucher programs operating around the country ... is further evidence of the public's support of choice."); Jean Merl, *Private School Scholarships Given to Needy*, L.A. TIMES, Jun. 15, 1994, at 3A (noting that new foundation supporting school vouchers is offering \$2.4 million in private school scholarships for low-income children in Los Angeles and Orange Counties).

The outpouring of money by private citizens and businesses to counteract the enjoinder of the newly expanded Milwaukee Choice Program is illustrative of the public's conviction regarding school voucher programs. See *Private Philanthropists*, *supra* note 48 (noting that \$1.8 million was donated by private citizens of Wisconsin as of September 22, 1995 to help give children of Milwaukee right to stay in schools of their choice).

⁸¹ See *Private Voucher Programs Flourish*, *supra* note 13.

⁸² *Id.*; see also Carson, *supra* note 80, at 16 (indicating that privately funded choice programs now serve approximately 7,000-8,000 children across country); Garber, *supra* note 80, at G1 (noting that since Golden Rule program started 11 more programs are operating around country); Merl, *supra* note 80, at 3A (noting that privately funded vouchers are operating in about dozen U.S. cities).

⁸³ See Carson, *supra* note 80, at 16 (noting privately funded voucher programs avoid "possible restrictions" imposed on government sponsored programs); Garber, *supra* note 80, at G1 (contending that private sector can implement reform options without government hindrance and citing fact that Former Secretaries of Education Lamar Alexander and Bill Bennett favor abolition of Department of Education); Marcia Sielaff, Remarks at the Economic Discussion Group (Apr. 27, 1994) (transcript available in 60 Vital Speeches 615) (indicating privately funded voucher programs avoid all issues surrounding publicly funded vouchers).

⁸⁴ See Garber, *supra* note 80, at G1 (indicating private sector can implement reform options without incurring attempts by organized interest groups, such as NEA, to thwart efforts at reform).

⁸⁵ See *id.* at G1 (noting first privately funded voucher program started in Indianapolis); Mary McGrath, *School Voucher Proposal Taps Corporations for Funds*, BERGEN REC., Oct. 19, 1995, at A3 (noting findings of Reason Foundation indicated

the private school of their choice due to the generosity of businesses and individuals.⁸⁶

The largest privately funded voucher program in the country is operated in Milwaukee by Partners Advancing Values in Education ("PAVE").⁸⁷ PAVE awards over 2,000 scholarships, valued at one half the yearly tuition at a private school, for elementary and secondary school students in Milwaukee.⁸⁸ Participating students attend almost one hundred private elementary and thirteen private high schools in the city.⁸⁹ The PAVE scholarship recipients, according to the second-year report of the PAVE program, "scored at their expected grade level and ranked above average on national percentile scores."⁹⁰ Moreover, interviews with the students, parents, and teachers indicate a genuine caring and concern among teachers, high teacher expectations of students, and substantial parental involvement.⁹¹ Despite the

that private voucher programs operated in 22 metropolitan areas nationally); see also *Private Voucher Programs Flourish*, supra note 13 (noting foundations operating private voucher programs in San Antonio, Texas, and Milwaukee, Wisconsin are to expand nationwide); Merl, supra note 80, at 3A (reporting foundation has established private voucher program for Los Angeles and Orange Counties).

⁸⁶ See McGrath, supra note 85, at A3.

⁸⁷ See *High Marks*, supra note 20, at 2. Dan McKinley has been Executive Director of PAVE, a private scholarship organization serving low-income families, since it was founded in 1991. See Laura Merisalo, *The Continuing Battle Over School Choice*, BUS. J. (Milwaukee), Nov. 4, 1995, at 23. "PAVE is a private model of how school choice can work for families." *Id.* But see Alex Molnar, *School Closings Reveal Flaw in Choice Program*, CAPITAL TIMES (Madison), Feb. 19, 1996, at 1C (reporting problems which have arisen in PAVE program).

⁸⁸ See *High Marks*, supra note 20 (stating that PAVE provided 2,654 scholarships in 1994); Merisalo, supra note 87, at 23 (noting PAVE "pays half the tuition for 3,695 elementary children and 632 high school students" during 1995-96 school year); *Private Voucher Programs Flourish*, supra note 13, at 2 (noting that PAVE, largest private voucher program in the country, allocates program scholarships to 2,033 elementary school and 417 secondary students). But see Molnar, supra note 87, at C1 (stating that "[a]t the moment, the Milwaukee voucher program doesn't provide enough money to start and run a viable school from scratch").

⁸⁹ See *Private Voucher Programs Flourish*, supra note 13, at 2 (finding that students in programs attend 92 different private elementary schools and 13 high schools in Milwaukee); *High Marks*, supra note 20, at 2 (participating students attend 84 elementary and 13 high schools).

⁹⁰ *Private Voucher Programs Flourish*, supra note 13, at 2 (quoting second-year report of PAVE program prepared by Family Service America, "an international nonprofit association dedicated to strengthening family life through services, education, research, and advocacy").

⁹¹ *Id.*; see also *High Marks*, supra note 20, at 2 (noting high rates of parental satisfaction with PAVE program after three years). A third year evaluation revealed, among other things, 96% parental satisfaction with the teachers' performance, 97% with the program of instruction and 97% with opportunities for parental

slow progress of publicly funded school voucher programs, the rapid growth of privately funded plans illustrates that school voucher programs remain highly desirable.

II. THE ESTABLISHMENT CLAUSE: CAN SCHOOL VOUCHER PROGRAMS SURVIVE?

The First Amendment of the United States Constitution contains the Establishment Clause which specifies, "Congress shall make no law respecting an establishment of religion, or prohibiting the exercise thereof"⁹² The protection of religious liberty is the central purpose of the Establishment Clause.⁹³ School voucher programs, which include private sectarian schools as participating schools, are subject to the challenge that they violate the Establishment Clause.⁹⁴ Challengers contend that fully participating voucher programs violate the prohibition against direct governmental support of religious institutions.⁹⁵

involvement. *Id.* "The overwhelming majority of parents were satisfied with the performance of the schools." *Id.* (citing findings of third-year evaluation).

⁹² U.S. CONST. amend. I.

⁹³ See *County of Allegheny v. ACLU*, 492 U.S. 573, 612 (1989) (indicating purpose of Establishment Clause is to protect secular liberty); *Wallace v. Jaffree*, 472 U.S. 38, 68 (1985) (O'Connor, J., concurring) (stating common purpose of Religion Clauses is to secure religious liberty); *Gillette v. United States*, 401 U.S. 437, 449 (1971) (noting that central purpose of Establishment Clause is "the purpose of ensuring governmental neutrality in matters of religion") (citations omitted); John N. Moore, *The Supreme Court and the Relationship Between the "Establishment" and "Free Exercise" Clauses*, 42 TEX. L. REV. 142, 196 (1963) (indicating purpose of Constitution's religion clauses is to maximize religious freedom). See generally Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559 (1989) (providing historical overview of development of religious clauses doctrine); Robert A. Holland, *A Theory of Establishment Clause Adjudication: Individualism, Social Contract, and the Significance of Coercion in Identifying Threats to Religious Liberty*, 80 CAL. L. REV. 1595 (1992) (providing argument supporting theory that religious liberty is central to Establishment Clause).

⁹⁴ See *supra* notes 47-50 and accompanying text (indicating Milwaukee Parental Choice Program is currently challenged as violative of Establishment Clause); see also Bright, *supra* note 61, at 228 (concluding that school voucher programs which include sectarian schools run afoul of Establishment Clause); Daniel, *supra* note 21, at 57 (indicating school choice plans which include sectarian schools have been challenged under Establishment Clause); David Futterman, Note, *School Choice and the Religion Clauses: The Law and Politics of Public Aid to Private Parochial Schools*, 81 GEO. L. J. 711, 714 (1993) (indicating that primary criticism of school choice is that it violates Establishment Clause).

⁹⁵ See, e.g., Steven K. Green, *The Legal Argument Against Private School Choice*, 62 U. CINN. L. REV. 37, 41 (1993) ("Under traditional Establishment Clause jurisprudence, public assistance to sectarian schools is unconstitutional because such aid invariably advances the religious mission of the sponsoring institution, thereby violating the principle of government neutrality toward religion."); Walter

The Supreme Court has recognized that interpreting the Establishment Clause as mandating total separation of church and state is unrealistic and undesirable.⁹⁶ Understanding the impracticality of requiring total separation, the Court requires the government to maintain a position of neutrality with respect to religion.⁹⁷ The Court has established a three pronged test, known as the "*Lemon* Test,"⁹⁸ to determine if a statute contravenes the Establishment Clause.

Under the first prong of the *Lemon* Test, a statute must have a "secular legislative purpose."⁹⁹ Secondly, the statute's

McCann & Judith Areen, *Vouchers and The Citizen—Some Legal Questions*, in EDUCATIONAL VOUCHERS, *supra* note 22, at 117 (indicating school voucher programs that include sectarian schools may violate Establishment Clause).

⁹⁶ Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 760 (1973) ("It has never been thought either possible or desirable to enforce a regime of total separation").

The concept of "total separation of church and state" is derived from the views of Thomas Jefferson. See Marla A. DeGaetano, Note, *Making the Establishment Clause in Reasonable Observer Cases More Reasonable*, 67 ST. JOHN'S L. REV. 939, 942-46 (1993) (reviewing competing approaches employed in Establishment Clause interpretation). The Supreme Court has quoted Mr. Jefferson as saying, "the clause ... was intended to erect 'a wall of separation between church and State.'" *Everson v. Board of Educ.*, 330 U.S. 1, 16 (1947). The Court, however, has recognized that "total separation is not possible in an absolute sense." *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971); see also *Lynch v. Donnelly*, 465 U.S. 668, 672-3 (1984) (noting that total separation between church and state is not possible); *Sherbert v. Verner*, 374 U.S. 398, 422 (1963) (Harlan, J., dissenting) (discussing "constitutional obligation of 'neutrality'" (citations omitted); *Engel v. Vitale*, 370 U.S. 421, 442 (1962) (Douglas, J., concurring) (expressing that Establishment Clause "leaves the Government in a position not of hostility to religion but of neutrality"); *Zorach v. Clauson*, 343 U.S. 306, 312 (1952) (finding that if separation were complete "the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly").

⁹⁷ See *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462, 2466 (1993) (finding that contrary rule would be undesirable, Court determined that "we have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit."); *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986) (finding assistance provided to petitioner attending sectarian school, under Washington's vocational rehabilitation program, was neutral and indirect government benefit); *Mueller v. Allen*, 463 U.S. 388 (1983) (holding Minnesota statute allowing tax deductions for all parents including those sending their children to sectarian schools, for certain school related expenses constitutional, viewing benefit as neutral program, neither advancing nor inhibiting religion).

⁹⁸ *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (indicating that three tests which have been enunciated by Court over years were combined to form Court's evaluation process under Establishment Clause).

⁹⁹ *Id.*

"principal or primary effect must be one that neither advances nor inhibits religion."¹⁰⁰ Finally, the statute must not cultivate an "excessive government entanglement with religion."¹⁰¹ The Court asserted that this test addresses the "three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'"¹⁰²

The objective of the "secular purpose" prong is to ensure that the legislative process does not become a surrogate pulpit for religious institutions.¹⁰³ When applying the secular legislative purpose test to religious aid legislation the Court's review is generally a cursory one.¹⁰⁴ The Supreme Court recognizes that "[a] State's decision to defray the cost of educational expenses incurred by parents—regardless of the type of schools their children attend—evidences a purpose that is both secular and understandable."¹⁰⁵ Moreover, the drafters of most legislation are skilled enough to write a statute in such a way as to avoid failing this prong of the *Lemon* Test.¹⁰⁶ Not all legislation manages to pass this test, however, and thus some statutes are found unconstitutional. For example, the Court viewed a Kentucky statute which required the posting of the Ten Commandments in each public school classroom as a statute "plainly religious in nature" and deemed it lacking a "secular legislative purpose."¹⁰⁷ Never-

¹⁰⁰ *Id.* (citations omitted).

¹⁰¹ *Id.* at 613 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)).

¹⁰² *Id.* at 612 (quoting *Walz*, 397 U.S. at 668).

¹⁰³ See *Lemon*, 403 U.S. at 622 (noting statute in question presented potential for "[p]artisans of parochial schools, understandably concerned with rising costs and sincerely dedicated to both the religious and secular educational missions of their schools, will inevitably champion this cause and promote political action to achieve their goals.").

¹⁰⁴ *Mueller v. Allen*, 463 U.S. 388, 395 (1983).

¹⁰⁵ *Id.*

¹⁰⁶ See, e.g., *id.* at 394-95 (indicating little time need be spent on inquiry into legislative purpose because governmental assistance programs have consistently survived this inquiry); *Meek v. Pittenger*, 421 U.S. 349, 363 (1975) (stating that brief inquiry into Congressional intent establishes legitimacy of secular legislative purpose); *Lemon*, 403 U.S. at 613 (stating that examination of legislative purpose behind relevant statutes provides no basis for concluding intent was to advance religion).

¹⁰⁷ *Stone v. Graham*, 449 U.S. 39, 41 (1980). The Court held a Kentucky statute that required the posting of a copy of the Ten Commandments on the wall of each public school classroom in the state had no secular legislative purpose and violated the Establishment Clause. *Id.*

The pre-eminent purpose for posting the Ten Commandments on school-

theless, the Court typically recognizes the existence of strong public interest in assuring the continued financial health of private schools and the public's desire to maintain the highest quality of education for their children.¹⁰⁸

The Court faces a more difficult challenge when evaluating legislation under the second prong of the *Lemon* Test.¹⁰⁹ In applying this part of the *Lemon* Test to religious school aid cases, the Supreme Court must consider whether the statute "advances or inhibits religion" thereby impacting religious liberty.¹¹⁰ The pivotal inquiry hinges on whether the financial aid flows either directly or indirectly from the state to the sectarian school.¹¹¹

room walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact... If the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments. However desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause.

Id. at 41-42 (footnote omitted).

¹⁰⁸ *Id.*

¹⁰⁹ See, e.g., *Mueller*, 463 U.S. at 396 (noting difficulty in determining whether statute has "the primary effect of advancing the sectarian aims of the nonpublic schools") (citations omitted).

¹¹⁰ See, e.g., *Whitters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 487-88 (1986) (holding that Washington statute which provided aid to individuals for vocational education was constitutional because individual, not state, chooses school); *Mueller*, 463 U.S. at 395 (finding Minnesota statute providing tax deductions for educational expenses incurred by "all" parents, including those whose children attend private sectarian schools, constitutional because of statute's broad, neutral applicability); *Tilton v. Richardson*, 403 U.S. 672, 685-86 (1971) (indicating that there is more danger in providing statutory aid to church-related primary and secondary schools with impressionable children than to church-related colleges).

¹¹¹ See *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) (striking down New York statute which provided, *inter alia*, tuition grants only for low income children attending non-public schools). The Court started its analysis by noting that "the propriety of a legislature's purposes may not immunize from further scrutiny a law which either has a primary effect that advances religion, or which fosters excessive entanglements between Church and State." *Id.* at 774. The Court determined the maintenance and repair provisions of the statute providing for "direct" benefits to nonpublic schools, "virtually all of which [were] Roman Catholic" is violative of the Establishment Clause because "their effect, inevitably, is to subsidize and advance the religious mission of sectarian schools." *Id.* at 774, 779-80. The Court invalidated the tuition reimbursement program for many of the same reasons articulated under the maintenance and repair provisions and concluded "[i]n the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid." *Id.* at 780. Moreover, the Court noted "[the precise] function of New York's law [is] to

Indirect funding occurs when aid is made available to any parent and then reaches the sectarian school by way of a private, independent decision made by that parent.¹¹² The Supreme Court requires a state to use language when drafting a statute that "maintain[s] an attitude of 'neutrality,' neither 'advancing' nor 'inhibiting' religion."¹¹³ The Court has reinforced its position on the constitutionality of "neutral" state benefits by finding lawful a benefit which was made available to all individuals, and required the recipient to determine where the benefit was used.¹¹⁴ General government programs which distribute benefits neutrally to any qualifying child "without regard to the 'sectarian-non-sectarian, or public-nonpublic nature' of the school the child attends ... [and providing] parents [the] freedom to select a school of their choice ... ensure that a government [benefit] will be present in a sectarian school only as a result of the private decision of individual parents."¹¹⁵

The third prong of the *Lemon* Test requires the Court to consider "the character and purpose of the institutions that are benefited, the nature of aid that by the State provides, and the resulting relationship between the government and the religious authority."¹¹⁶ The Court is concerned with "programs, whose very nature is apt to entangle the state in details of administration"¹¹⁷ Statutes which require the state to monitor the activities of a sectarian school to ensure adherence to the secular purpose of the law create "excessive and enduring entanglement between state and church" and are "fraught with the sort of entanglement that the Constitution forbids."¹¹⁸

provide assistance to private schools, the great majority of which are sectarian." *Id.* at 783. Finally, under the Court's analysis of the tax credit provisions it noted the credit was only available to parents who send their children to private schools and not available to "all" parents thus viewing the credit as "advancing" religion. *Nyquist*, 413 U.S. at 793-94.

¹¹² See *supra* note 111 (noting Court's view on indirect and direct funding).

¹¹³ *Nyquist*, 413 U.S. at 788.

¹¹⁴ See, e.g., *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462 (1993) (holding that Establishment Clause does not prevent state from providing sign language interpreter to accompany deaf student at Roman Catholic high school). The Court viewed the government program as providing neutral benefits to a broad class of citizens defined without reference to religion. *Id.* at 2469. Additionally, the program distributes benefits after the parents independently select the school of their choice for their disabled children. *Id.*

¹¹⁵ *Id.* at 2467.

¹¹⁶ See *Lemon v. Kurtzman*, 403 U.S. 602, 615 (1971).

¹¹⁷ *Walz v. Tax Comm'n*, 397 U.S. 664, 695 (1970) (Harlan, J., concurring).

¹¹⁸ *Lemon*, 403 U.S. at 619-20.

It is suggested that a properly designed, fully participating school voucher program should withstand a challenge under the Establishment Clause. The once rigid case law has evolved to allow a "neutral" state benefit, neither advancing nor inhibiting religion, to flow "indirectly" to sectarian schools.¹¹⁹ The Supreme Court is concerned with state actions that appear to promote or inhibit religion.¹²⁰ A school voucher program that provides for the random selection of participants from all school children and enables their parents to select a school of their choice would be viewed as a neutral state benefit. A properly drafted voucher program "ensures" that state money will be present in a sectarian school only after "the private decision of individual parents."¹²¹ The state money, under a publicly funded school voucher program has an equal chance of remaining in the local public school or being applied to the tuition at a private school.¹²²

¹¹⁹ See, e.g., *Zobrest*, 113 S. Ct. 2462 (allowing state employed sign language interpreter to accompany deaf student attending Catholic high school); *Whitters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986) (allowing state finance of blind student's training at Christian college under state vocational program); *Mueller v. Allen*, 463 U.S. 388 (1983) (permitting tax deductions for school expenses for all parents of school children). But see *Aquilar v. Fenton*, 473 U.S. 402 (1985) (prohibiting state from using federal funds to pay salaries of public school employees who teach in religious schools); *Wolman v. Walter*, 433 U.S. 229 (1977) (holding state's provision of bus transportation for religious school field trips unconstitutional); *Meek v. Pittenger*, 421 U.S. 349 (1975) (prohibiting state from providing remedial teaching and counseling services on religious school grounds).

¹²⁰ See *supra* note 114; see also *Lee v. Weisman*, 505 U.S. 577 (1992) (prohibiting secondary schools from starting graduation ceremonies with invocation delivered by clergy person, noting that "degree of school involvement here made it clear that the graduation prayers bore the imprint of the state and thus put school-age children who objected in an untenable position."); *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (holding government display of creche unconstitutional because it appears to indicate government's advancement of religion).

¹²¹ See *Zobrest*, 113 S. Ct. at 2467; see also 1995 Wis. Legis. Serv. 27, §§ 4004, 4006m (West) (providing details of voucher program which provides that "[t]he pupil or the pupil's parent or guardian shall submit an application ... to the participating private school that the *pupil wishes to attend*..." and "[u]pon receipt from the pupil's parent or guardian of proof of the pupil's enrollment in the private school, the state superintendent shall pay to the parent or guardian ... an amount equal to the total amount [available under the program]" (emphasis added); CLINT BOLICK & RICHARD D. KOMER, INSTITUTE FOR JUSTICE, *School Choice: Answers to the Most Frequently Asked Legal Questions*, (1995). One feature required of school voucher program to survive First Amendment challenge is "[t]he decision of which school to choose is made by parents or students, not the state." *Id.* at 4. The funds must be "transmitted from the state to religiously affiliated schools only through the independent decisions of third parties." *Id.*

¹²² See *supra* note 121 (supporting theory that, in order to pass constitutional muster, voucher program must provide parents and students with choice between

The decision rests in the parents' hands to make the choice; voucher programs simply provide the opportunity for that choice.

A voucher program which indirectly funds a sectarian school must not create "excessive and enduring entanglements between state and church" in order to satisfy the third prong of the *Lemon* Test.¹²³ Private, sectarian, and non-sectarian schools are already subject to some state and federal education regulations.¹²⁴ A private religious school, by accepting vouchers, should not become subject to any additional state supervision or regulation.¹²⁵

The Court's inconsistency in applying the *Lemon* Test has often been criticized.¹²⁶ Supreme Court dicta has reflected the

public and private schools). The Supreme Court has allowed benefits that were available for use in either private or public school, as long they were directed to the school after the private decision of the parent, viewing the benefits as neutral in their effect. *See, e.g., Zobrest*, 113 S. Ct. 2462; *Whitters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986). The Court, however, has disallowed a tax deduction that was made available only to parents sending their children to private schools, viewing the benefit as providing an incentive to choose private schools. *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973). It is suggested that school voucher programs that direct money to either private or public schools after the private decision of parents would be viewed by the courts as an allowable neutral state benefit. It would not create an incentive for parents to send their children to private schools thereby leaving the private or public school with no state created advantage in receiving the money. "Parents would seek that school that best met their own concerns with respect to the education of their children." Levin, *supra* note 19, at 256. "A voucher plan would relegate the production of education to a marketplace in which both public and private schools would compete for students." *Id.*

¹²³ *Lemon*, 403 U.S. at 614.

¹²⁴ *See, e.g., N.Y. EDUC. LAW* § 807 (McKinney 1994) (mandating that all schools instruct and train students on fire drill procedure); 20 U.S.C. § 1411(a)(4) (1995) (ensuring that all schools comply with regulation regarding education of handicapped children).

¹²⁵ *See BOLICK & KOMER, supra* note 121, at 7 (stating that provision of public funds does not invariably subject private schools to extensive government regulation). "Even absent public funds, the state permissibly may regulate private schools." *Id.* School voucher programs can vary in several key aspects, one of which is the extent of state regulation of participating schools. *See HENIG, supra* note 68, at 175-78 (discussing various government regulation of education). It should be noted, however, that "[t]he ultimate safeguard is the freedom of private schools to refuse to participate in choice programs if they deem restrictions too onerous." *BOLICK & KOMER, supra* note 122, at 7.

¹²⁶ *See, e.g., Donald L. Beschle, The Conservative as a Liberal: The Religion Clauses, Liberal Neutrality, and the Approach of Justice O'Connor*, 62 NOTRE DAME L. REV. 151 (1987) (indicating that *Lemon* test is criticized due to vague language, inconsistent results, and test's lack of validity); Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools—An Update*, 75 CAL. L. REV. 5-6 (1987) (noting inconsistencies in decisions after *Lemon* "have produced a conceptual disas-

view that the *Lemon* Test may be in need of revision.¹²⁷ In a concurring opinion in *Lynch v. Donnelly*,¹²⁸ Justice O'Connor enunciated a revision to the *Lemon* Test which has since been labeled the "Endorsement Test."¹²⁹ Under this test, the government can violate the Establishment Clause in two ways. The first violation occurs when the government becomes "excessively entangled" with religious institutions.¹³⁰ Justice O'Connor indicated that an excessive entanglement could result in some religious groups gaining access to government services which are not available to everyone.¹³¹ Moreover, excessive entanglement could lead to the creation of political constituencies based upon religious agendas.¹³² The second violation results when government appears to either endorse or disapprove of religion.¹³³ Justice O'Connor explained that one of the purposes of the Establish-

ter area"); Evan M. Tager, *The Supreme Court, Effect Inquiry, and Aid to Parochial Education*, 37 STAN. L. REV. 219 (1984) (arguing that second prong of *Lemon* Test is inadequate and should be reexamined); Paul J. Weishaar, *School Choice Vouchers and The Establishment Clause*, 58 ALB. L. REV. 543 (1994) (noting that third prong of *Lemon* Test has been criticized for not providing adequate guidance); DeGaetano, *supra* note 96, at 947 (noting that *Lemon* Test "has been the subject of much criticism since the Supreme Court enunciated it ...").

¹²⁷ See *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141, 2149-50 (1993) (Scalia, J., dissenting) (launching his most recent attack on *Lemon*, stating "[The test is like] some ghoul in a late-night horror movie that repeatedly sits up in its grave and schuffles along, after being repeatedly killed and buried ... No fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart ..."); *County of Allegheny v. ACLU*, 492 U.S. 573, 655-56 (1989) (Kennedy, J., dissenting) (noting extensive criticism of *Lemon* test and arguing to use it as "signpost" rather than comprehensive test); *Wallace v. Jaffree*, 472 U.S. 38, 106 (1985) (Rehnquist, J., dissenting) (advocating abandonment of *Lemon* Test because it is based on improper reading of history); *id.* at 89 (Burger, C.J., dissenting) (stating that *Lemon* Test exists only to provide signposts for courts and does not provide bright-line approach); *id.* at 69-70 (O'Connor, J., concurring) (calling for refinement of *Lemon* test to make it more helpful in achieving underlying purpose of religion clauses); *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring) (indicating that *Lemon* Test is in need of "clarification").

¹²⁸ 465 U.S. 668 (1984).

¹²⁹ *Wallace v. Jaffree*, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring) (labelling her analysis "Endorsement Test" because it examines whether government's purpose is to endorse religion and whether statute conveys message of endorsement).

¹³⁰ *Lynch*, 465 U.S. at 687-88.

¹³¹ *Id.*

¹³² *Id.* at 688 (citing *Larkin v. Grendels Den, Inc.*, 459 U.S. 116 (1982) (holding statute, which gave governing body of church power to deny liquor licenses to its neighbors, violated Establishment Clause)).

¹³³ *Id.*

ment Clause is to avoid political divisions along religious lines.¹³⁴ Furthermore, the "Endorsement Test" can serve to clarify analysis made under the second prong of the *Lemon* Test because it focuses on the "institutional entanglement" and "endorsement or disapproval of religion."¹³⁵ It appears Justice O'Connor's primary objective in religious school aid cases is the prevention of government programs that could inadvertently bring any form of religion into the school room.¹³⁶

Application of the "Endorsement Test" to a fully participating school voucher program would not prove fatal. The government would be no more entangled with the religious institution accepting school vouchers than it is currently involved with religious schools.¹³⁷ Moreover, it is the parents, not the government, who endorse or disapprove of the religious school when they exercise their choice.¹³⁸ The government would simply be providing parents with the ability to make that choice freely.¹³⁹

Based upon the recent trend in Supreme Court decisions, it seems that school voucher programs will be evaluated under a

¹³⁴ *Id.* at 689.

¹³⁵ *Lynch*, 465 U.S. at 690. Justice O'Connor reasoned that the "Endorsement Test" modification would prevent invalidation of some laws that the Court has upheld even though they may advance or inhibit religion, such as tax exemptions for religious organizations. *Id.* at 691-92. *See, e.g.,* *Walz v. Tax Comm'n*, 397 U.S. 664, 694 (1970) (upholding property tax exemptions for religious, educational, and charitable organizations); *Zorach v. Clauson*, 343 U.S. 306 (1952) (sanctioning law giving public school students released time for religious instruction).

¹³⁶ *See* *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 398-400 (1985). Justice O'Connor distinguished between a parochial school teacher paid by the state and a public school teacher who taught parochial school students, viewing only the former as an unconstitutional violation of the Establishment Clause. *Id.* at 399-400. Justice O'Connor indicated that parochial school teachers being paid by the state had the perceived and actual effect of advancing religion. *Id.* at 400.

¹³⁷ *See supra* notes 124-25 and accompanying text (citing instances of government involvement in school affairs under school voucher programs).

¹³⁸ *See supra* note 121 (indicating choice of school stems from parents' private, independent decision). Justice O'Connor applied an "objective observer" standard when determining if the religious activity in question would be viewed as government endorsed. *See* *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring) ("[w]hether an objective observer acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement."). Applying this to school voucher programs, the question becomes whether an "objective observer" would conclude that the state was endorsing religion by providing parents with the opportunity to make a private, independent decision as to whether their child[ren] attend a sectarian, non sectarian, or public school. It is submitted that an objective observer would not.

¹³⁹ *See supra* note 121 (noting independent choice of parents under school voucher program).

more modern doctrine. The new doctrine appears to provide school voucher programs with a roadway through the Establishment Clause.

III. HOW SCHOOL VOUCHER PROGRAMS CAN FOSTER PUBLIC SCHOOL REFORM

Proponents of school voucher programs assert that empowering parents with the freedom to choose their children's schools will create competition among schools.¹⁴⁰ Currently, public school systems have a quasi-monopoly and a captive consumer.¹⁴¹ Parents, particularly in low-income families, have little or no choice as to where they can send their children to school.¹⁴² The

¹⁴⁰ See *supra* note 72 (noting competitive market theory underlying school voucher programs); see also Bright, *supra* note 61, at 199 (noting proponents of California's school voucher program claimed program would increase quality of education by creating competition among schools thereby forcing schools to "stream-line wasteful bureaucracy and inefficient practices in order to attain greater academic achievement out of each dollar spent."); Richard Delgado, *The Critique of Normativity: Norms and Normal Science: Toward A Critique of Normativity in Legal Thought*, 139 U. PA. L. REV. 933, 939 (1991) (noting that giving parents choice of schools will create competition among those schools for students, forcing upgrade in quality of instruction); Green, *supra* note 95, at 37-38 ("The gist of [school voucher programs] is that enabling parents to choose between sending their children to public schools or their private counterparts will increase parental involvement in education and make public schools more responsive and more innovative as they compete for scarce resources and the best students."); Moss, *supra* note 72 ("Without competition that would spur correction of deficiencies, the system does little or nothing to improve teaching techniques, allow more creativity in the classroom and recognize the individuality of the children.").

¹⁴¹ See Paul E. Peterson, *Monopoly and Competition in American Education*, in CHOICE AND CONTROL, *supra* note 19, at 47 (noting that public schools squeeze out potential competitors through their quasi-monopoly of education). "The quasi-monopoly in public education is today so pervasive a fact of American life that its existence is pretty much taken for granted." *Id.* at 51; see also James A. Peyser, *Issues in Education Law and Policy: School Choice: When, Not If*, 35 B.C. L. REV. 619, 621 (1994) (stating that public education establishment has vested interest in status quo, has virtual monopoly on elementary and secondary education, and, like all monopolists, want to protect its franchise); Lewis D. Solomon, *The Role of For-Profit Corporations in Revitalizing Public Education: A Legal and Policy Analysis*, 24 U. TOLEDO L. REV. 883 (1993) (noting that American public schools have a near-monopoly—no performance standards and little competition either from within education system or from outside); Debenport, *supra* note 70, at E1 (quoting Tim Sheehy, President of Metropolitan Milwaukee Association of Commerce, as stating that there is need to "break the monopoly" in public schools as to create competition and stimulate reform); Sielaff, *supra* note 83 ("The public school system displays all the typical symptoms associated with tax-funded organizations guaranteed a captive clientele—waste, rigidity and low productivity.").

¹⁴² See, e.g., Mark J. Beutler, *Public Funding of Sectarian Education: Estab-*

local public school system, regardless of the quality of education provided, is nearly guaranteed the attendance of school-aged children in the community.¹⁴³ Public school administrators have no market incentive to better the quality of their educational programs.¹⁴⁴ The administrators know that regardless of the test scores or graduation rates achieved by the student body, local children will likely have no option but to enroll.¹⁴⁵ Additionally,

ishment and Free Exercise Clause Implications, 2 GEO. MASON U. L. REV. 7 (1993) (noting that options in schooling are frequently beyond means of low-income families, whereas wealthier families can either relocate to areas offering superior schooling or send children to private schools); Romel Hernandez & Christopher Broderick, *Children Get Left Behind, A Struggling Education System Threatens to Unravel the City's Cultural and Economic Renaissance*, ROCKY MOUNT. NEWS, Apr. 23, 1995, at 24A (quoting Denver school board member, "I see a district where the poor probably have no choice but Denver Public Schools ... Others will have choices ..."); Buttress, *supra* note 72, at B1 (stating that income levels of most citizens limit their options in schooling to public schools); *see also* Mark Skertic, *Cincinnati Schools*, CINN. ENQUIRER, Aug. 27, 1995, at A1 (noting that 51% of Cincinnati public school students come from families earning less than \$20,000 annually, 45% of students come from families earning between \$20,000 and \$74,999, and only 4% of students come from families earning over \$75,000).

¹⁴³ *See, e.g.*, ALA. CODE § 16-28-3 (1995) (requiring all children between ages 7-16 to attend school); CAL. EDUC. CODE chap. 2 (West 1995) (defining state compulsory education law); MICH. COMP. LAWS ANN. § 380.1561 (West 1993) (requiring all children ages 6-16 to attend school); *see also* Peyser, *supra* note 141, at 622 n.13 (indicating that 87% of all elementary and secondary school students in United States are enrolled in public schools); Billy House, *School Enrollments to Swell*, GANNETT NEWS SERVICE, Dec. 6, 1995 (Albany) (noting that 85% of New York State's school-age students attend public schools); Valerie Strauss, *The Pull of Private School; Area Enrollment Exceeds National Average*, WASH. POST, Nov. 13, 1995 at A1 (stating that only 11% of all students in United States attend private schools). The combined effect of compulsory education laws and statistics, indicating that at least 85% of all school-age children attend public school, illustrates that public schools are essentially "guaranteed" students.

¹⁴⁴ *See, e.g.*, HARRY H. WELLINGTON & RALPH K. WINTER, JR., *THE UNIONS AND THE CITIES* 30 (1972) ("[B]ecause the demand for education is relatively inelastic, teachers rarely need fear unemployment ... the threat of an important nonunion rival (competitive private schools) is not to be taken seriously so long as potential customers of private education must pay taxes to support the public school system."); Levin, *supra* note 19, at 255 ("If the state paid all of the costs [of education], the teacher '... would soon learn to neglect his business.'") (quoting ADAM SMITH, *THE WEALTH OF NATIONS* (Edward Cannan, ed., 1937) (1776)); Moss, *supra* note 72 (claiming that absence of market incentives leaves school administrators, principals, and teachers free to underachieve); Sielaff, *supra* note 83 (criticizing monopoly held by public schools because it "relieves educrats of accountability"). "If schools are not subject to economic discipline by patrons free to reject their products 'they will not succeed either as places of learning or as human communities.'" *Id.* (quoting John E. Coons, *Comments on the Law on Education of the Russian Federation* (1993)).

¹⁴⁵ *See supra* notes 142-43 (indicating that public schools are many students' only choice in education); *see also* 19 WEEKLY COMP. PRES. DOC. 592 (transcribing President Reagan's remarks after receiving education commission report on condi-

the administrators are also aware that the per-pupil state funding will continue and is not tied to school performance.¹⁴⁶

The lack of competition is one of the leading causes of the decline of the American public school system. For example, imagine if American business could rely on a guaranteed customer base with a guaranteed cash flow. In a competitive market, the fear of losing customers and the associated cash flow is a very real concern.¹⁴⁷ Corporations continually evaluate their product line, productivity, customer service satisfaction, and corporate efficiency in order to remain competitive and viable.¹⁴⁸ Similarly, a public school system required to compete with other education providers in the community would be forced to become more efficient, provide a better product, and improve services in order to remain viable.

School vouchers will give poor and working-class parents the opportunity to send their children to the school which they believe will provide the best possible education.¹⁴⁹ Wealthier par-

tion of nation's public education system). "Despite record levels of educational spending, America's students came in last in 7 of 19 academic tests compared to students of other industrialized nations." *Id.*; David Poppe, *Turning Point: The Coming Revolution in Florida Education*, FLA. TREND, Sept. 1995, at 30 (claiming that many large public school districts in Florida have created schools that can "seem unresponsive to parents or students").

¹⁴⁶ See, e.g., Sielaff, *supra* note 83 (noting that poor test results qualify schools for additional funding). Furthermore, education special interest groups have consistently persuaded legislatures, school boards, and parents that what is good for them is also good for the children. *Id.* Typically what these groups have lobbied for is simply more money. *Id.*

¹⁴⁷ See, e.g., *Electricity Prices Will Decrease in Competitive Market Says Wisconsin Electric in Final Comments to PSCW*, PR NEWswire, Dec. 4, 1995, available in LEXIS, News Library, Wires File ("In a competitive market, low-cost suppliers that consider raising prices risk losing customers to competitors lowering prices to attract more business."); Thomas O. Jones & W. Earl Sasser, *Why Satisfied Customers Defect*, HARV. BUS. R., Nov./Dec. 1995, at 88 (claiming that except in "few rare instances, complete customer satisfaction is the key to securing customer loyalty and generating superior long-term financial performance" and that "[m]ost managers realize the more competitive the market, the more important the level of customer satisfaction").

¹⁴⁸ See, e.g., *GM Reports Record Net Income of \$2.3 Billion for Second Quarter of 1995*, CANADA NEWswire, July 29, 1995, available in LEXIS, News Library, Wires File (indicating auto industry recognizes that they must maintain their focus, continually improve quality of their products, and maintain customer satisfaction in competitive auto market); *Fiat Group: 1994 Six Months Results*, PR NEWswire, Sept. 29, 1994, available in LEXIS, News Library, Wires File (noting that Fiat Group recognizes that innovation, efficiency, and high quality products and services will be crucial factors in determining success in increasingly competitive market).

¹⁴⁹ See *supra* note 142 (noting lack of educational choice for low-income families); Areen & Jencks, *supra* note 22, at 50-51 (indicating that average parent has no

ents have the financial capability to bypass public schools, when appropriate, and send their children to their school of choice.¹⁵⁰ A voucher system would give all parents the same power of choice.¹⁵¹ Wisconsin state representative Annette Williams stated: "The state is directly helping families who have drive, who have high expectations, but who don't have money, to vote with their feet."¹⁵² This empowerment of low-income families should motivate the public schools to respond and reform or risk losing their student population to another school, public or private, that is operating efficiently and effectively.¹⁵³

The original GI Bill, which provided for college tuition payments based on active duty service, was a government sponsored education voucher program.¹⁵⁴ Under the GI Bill, established in 1944, military veterans were able to attend the college or university of their choice—public or private, sectarian or non-sectarian—and the tuition costs were either offset or covered in full through a voucher payment sent *directly* to the selected

choice except to send children to public schools, but with vouchers, parents can choose best school rather than closest school); Daniel, *supra* note 94, at 27 (indicating that vouchers will empower parents to choose schools of highest quality for their children); Green, *supra* note 21, at 38 (noting choice advocates argue choice will "empower parents—especially those on the lower-economic level—to obtain a better education for their children than is afforded through the public education system"); Deborah Ramirez, SYMPOSIUM: RACE AND REMEDY IN A MULTICULTURAL SOCIETY: *Multicultural Empowerment: It's Not Just Black and White Anymore*, 47 STAN. L. REV. 957, 986 (1995) (noting that school choice programs can "empower low-income parents of all races and ethnicities to define their children's educational needs").

¹⁵⁰ See *supra* note 23 (noting wealthier parents have choices in education not available to low-income families).

¹⁵¹ See Justin J. Sayfie, Comment, *Education Emancipation for Inner City Students: A New Legal Paradigm for Achieving Equality of Educational Opportunity*, 48 U. MIAMI L. REV. 913, 939 (1994) ("A voucher remedy can do what no other remedy ... can do; it gives the poor and the less fortunate more control and power over the decisions that affect their lives."). Higher income families "can either leave a school they regard as unfit by moving to another district, or they can pay tuition at a private school. Families dissatisfied with a legally inadequate school who do not have these resources have no options—they are bonded to substandard schools." *Id.* at 939-40 (footnote omitted); see also *supra* notes 23 and 142 (noting lack of educational choices available for low-income families).

¹⁵² SPRING, *supra* note 21, at 163-64 (quoting Annette Williams).

¹⁵³ See CHUBB & MOE, *supra* note 21, at 226 (1990) (indicating availability of parental choice will force schools of inferior quality to either provide better service or cease to exist).

¹⁵⁴ See Servicemen's Readjustment Act of 1944, Pub. L. No. 78-346, 58 Stat. 284, 288 (1944) ("[A qualifying veteran] shall be eligible for and entitled to such course of education or training as he may elect, and at any approved educational or training institution at which he chooses to enroll ...").

school.¹⁵⁵ The constitutionality of the tuition voucher component of the GI Bill has never been challenged.¹⁵⁶ In fact, the flourishing of the American university system has been credited to the GI Bill.¹⁵⁷ Moreover, it has never been accused of causing the decline of public universities or causing segregation.

Over forty years later, President George Bush proposed the "GI Bill for Children," but it failed to receive the approval of Congress.¹⁵⁸ The primary reason for the different outcome of the

¹⁵⁵ See *id.* at 289 (providing payment should be made directly to education or training facility); *Bob Jones Univ. v. Johnson*, 396 F. Supp. 597, 603 (D.S.C. 1974) (noting original GI Bill "provided for direct payment to schools and other vendors of supplies and services for books, tuition and other educational expenses"), *aff'd*, 529 F.2d 514 (4th Cir. 1975); HENIG, *supra* note 68, at 92 (noting original GI Bill did not limit schools veterans could attend). The GI Bill has undergone many revisions since its original version was adopted in 1944. See, e.g., R. Lamont Jones, Jr., *GI Bill Changed the Face of U.S. Education*, PITTS. POST-GAZETTE, June 22, 1994, at A1 (noting that original bill ended in 1956 and supplying history of revisions leading up to current Montgomery GI Bill). The current program provides for payment to be made to the eligible serviceman directly. 38 U.S.C. § 3014 (1994). Additionally, the new program limits the amount of benefits to \$400 per month. 38 U.S.C. § 3015 (1994).

¹⁵⁶ See *Whitters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 486 n.3 (1986) (describing structure of GI Bill as "hands off" aid). Although the dispersion of funds to a sectarian institution for a veteran's education has not been challenged, the Supreme Court has ruled that the GI Bill's disallowance of benefits to a conscientious objector who performed two years of alternative civilian service was not an interference "with his free exercise of religion by increasing the price he must pay for adherence to his religious beliefs." *Johnson v. Robison*, 415 U.S. 361, 383 (1974).

¹⁵⁷ See, e.g., Jones, *supra* note 155, at A1 (noting GI Bill caused "skyrocketing" enrollment in American universities and colleges and quoting Penn State professor Roger L. Geiger as stating, "[b]y 1948, the Veterans Administration was paying 56 percent of student fees in private universities and 67 percent in public ones"); Richard J. Maloy, *A Law That Changed America; The GI Bill Was a Lucky Accident*, WASH. POST, June 24, 1994, at A27 (crediting GI Bill for transforming U.S. into "knowledge society" where "college education became commonplace"); Donald W. Patterson, *GI Bill Gave Many a New Start; Enacted 50 Years Ago*, NEWS & RECORD, (GREENSBORO, N.C.) June 22, 1994, at A1 (indicating that "[e]xperts say the GI Bill shifted America from an industrial society to knowledge society and in process created economic and educational revolution").

¹⁵⁸ See H.R. 5664, 102d Cong., 2d Sess. (1992); S. 3010, 102d Cong., 2d Sess. (1992). The legislation proposed the "Federal Grants for State and Local 'GI Bills' for Children." H.R. 5664, 102d Cong., 2d Sess. (1992). The purpose of the Act was to give "children from middle- and low-income families more of the same choices of all elementary and secondary schools and other academic programs that children from wealthier families already have." *Id.* at § 2. The goal of the Act was to improve schools by giving middle- and low-income parents the power of choice. *Id.* The value of each "scholarship" was \$1000 and could be used at any participating school, sectarian or nonsectarian. *Id.* §§ 5-6.

two programs was the effect of special interest groups. No group lobbied against the GI Bill; the GI Bill for Children, however, was vehemently opposed by the NEA.¹⁵⁹ If the tuition assistance portion of the GI Bill is both constitutional and effective, it should logically follow that a school voucher program at the state level would also be constitutional and effective.

The biggest myth created by the public school system is that more money means better education.¹⁶⁰ The Kansas City Public School System illustrates the fallacy of this concept.¹⁶¹ The Kan-

¹⁵⁹ See, e.g., Carol Innerst, *Alexander Rips NEA's Effort to 'Control' Schools*, WASH. TIMES, July 7, 1992, at A3 (noting NEA opposed voucher plans consistently since 1970 and "GI Bill for Children" will be no different); Martin Kasindorf, *Dems' Road Not Taken; Bush Woos Catholic Vote, Touts Tuition-Grant Plan*, NEWSDAY, July 22, 1992, at 14 (New York City ed.) (indicating strong opposition by NEA for "GI Bill for Children"); Frank J. Murray, *Bush Assails Union Over School Choice*, WASH. TIMES, July 22, 1992, at A4 (quoting President Bush as saying "Many that control the establishment in Washington are in the grips of a very powerful union, the NEA, and ... it seems to be an arm of the opposition party."); see also David A. Vise, *Senate Rejects Tuition Vouchers, Keeping D.C. Budget in Limbo*, WASH. POST, Feb. 28, 1996, at A1 (noting NEA's influence in defeating voucher legislation).

¹⁶⁰ See, e.g., Samuel R. Staley, *Public School Failings Shouldn't Be Blamed on Inadequate Spending*, PERSP., June 15, 1995 (published by The Buckeye Institute for Public Policy Solutions) (noting that critics' attempts to blame Ohio public school decline on insufficient funding is erroneous because state's district with highest per-pupil spending had "lowest pupil attendance rates, highest drop out rates, and lowest graduation rates"); Marjorie Davies, *Spending and Student Achievement in Ohio Public Schools: Providing Incentives For Efficiency*, REGIONAL POLY REP. NO. 2, BUCKEYE INST. FOR PUBLIC POLICY SOLUTIONS, Apr. 30, 1991, at ii ("[S]pending on public education in Ohio is negatively correlated with student achievement. That is, lower spending districts tend to have higher student achievement ...") (emphasis omitted); Sielaff, *supra* note 83 (noting that preponderance of educational research has failed to show a connection between more money and improved achievement); *School Choice; Parents Deserve the Freedom to Pick Best Schools for Kids*, CINN. ENQUIRER, Mar. 5, 1995, at H2 ("[T]hose who attended good public schools a generation ago must face sobering facts: Despite two decades and billions of dollars spent on reforms, most public schools are not delivering results to match insatiable spending.").

¹⁶¹ In the wake of a landmark 1985 federal court school desegregation order, the Kansas City Public School system implemented a 10 year plan to overhaul the public school system. See *Jenkins v. Missouri*, 639 F. Supp. 19 (W.D. Mo. 1985), *aff'd*, 807 F.2d 657 (8th Cir. 1986), *cert. denied*, 484 U.S. 816 (1987). In further litigation over the desegregation order, the court ordered a property tax increase to help fund the project. See *Jenkins v. Missouri*, 672 F. Supp. 400, 413 (W.D. Mo. 1987). The Governor of Missouri considered the court ordered tax increase to have created "additional funds for additional educational frills, the court has created a bureaucratic nightmare." Toni Cardarella, *Ashcroft Blasts KC Desegregation Ruling*, UPI, Sept. 22, 1987, available in LEXIS, Nexis Library, UPI File; see *infra* notes 162-63 (indicating how much money was spent, what it was spent on and current status of Kansas City Public Schools).

sas City Public School System received over one billion dollars to fund programs designed to enhance the quality of education.¹⁶² The money was used to improve existing schools, develop magnet schools, and purchase state-of-the-art computer systems for the schools.¹⁶³ After ten years, the school system's test scores and graduation rates have shown little or no improvement.¹⁶⁴ Kansas City's experience is not unique.¹⁶⁵ Many public school budgets have steadily increased, yet student achievement has remained steady or has declined.¹⁶⁶ With the average per-pupil cost exceeding \$5,700 for elementary and secondary schools, it seems startling that the public school system cannot perform better.¹⁶⁷ The

¹⁶² See Retha Hill, *School Desegregation Effort Shows High Cost of Change; Missouri Model Offers Lessons for P.G.*, WASH. POST, Jan. 9, 1995, at A1 (indicating cost of \$1.3 billion over last decade).

¹⁶³ See, e.g., Cardarella, *supra* note 161 (indicating that Governor viewed district plans, which included building of heated log cabin with toilets and capacity for 26 persons, 25 acre working farm, and air conditioned meeting room, as plans which "simply do not reflect the needs of quality education"); Stephen Chapman, *The Kansas City Plan Is a Decisive Failure*, ST. LOUIS POST-DISPATCH, Sept. 7, 1993, at 7B (noting additions including purchase of \$250,000 planetarium); Hill, *supra* note 162, at A1 (indicating implementation of magnet schools and purchasing of 9,000 computers as part of court ordered reform in Kansas City). As part of the rebuilding, the district spent \$32 million on creating the "sports and computer" magnet school which has computers for almost every student, an Olympic size pool and indoor track. *Id.*

¹⁶⁴ See, e.g., Hill, *supra* note 162, at A1 (noting Kansas City's spending program produced slight gains in student achievement); Lynn Horsley, *Scores Would Be a Test for Murphy; KC Students Still Do Well in Early Grades but then Fall Below National Average*, KAN. CITY STAR, Sept. 19, 1995, at A1 (noting scores of students grades 1-3 were above national average, but older grades' scores remain below average); Jacob H. Wolf, *Desegregation Payments Hit \$1 Billion*, UPI, Oct. 4, 1990, available in LEXIS, Nexis Library, UPI File (quoting Missouri State Treasurer Wendell Bailey as saying "[t]here has been no marked improvement in [Kansas City] test scores notwithstanding per-pupil expenditures which are nearly double statewide levels"); Mary Jo Draper, *Kansas City Fights Staggering School Drop Out Rate*, Nat'l Pub. Radio, July 6, 1995 (reporting that only 1,100 of more than 2,500 students who began ninth grade in 1990 graduated from Kansas City high schools).

¹⁶⁵ See Neil MacFarquhar, *Education Chief in Trenton Asks Legislature to Set School Budgets*, N.Y. TIMES, Nov. 22, 1995, at A1 (reporting that according to New Jersey Commissioner of Education, Dr. Leo F. Klagholz, "New Jersey spends \$12 Billion a year on education—more per pupil than any other state—but ... spending [is] not reflected in overall student achievement"); *Spending Per Pupil and National Testing: More Money Does Not Mean Better Scores*, BUS./EDUC. INSIDER, May 1992, at 3 (providing chart showing that states with below average spending rank high in test scores).

¹⁶⁶ See *supra* note 5 (indicating increasing school budgets and falling performance).

¹⁶⁷ See *Average Per Pupil Expenditures up 25% From 1988-89*, EDUC. MARKETER, Jan. 2, 1995 (noting national average reached \$5,726 in 1993-94 school year,

fact that forty-eight percent of the money received covers administrative costs and only fifty-two percent of it reaches the classroom is not only insulting but also provides an explanation as to why the system fails to do better.¹⁶⁸ Critics of the voucher system claim that it will drain money away from public schools, thereby causing them to become a wasteland.¹⁶⁹ To the contrary, it is suggested that vouchers will not only force public schools to manage their budgets more efficiently, but also will provide the necessary incentives to improve the quality of their educational programs.

American business executives have given the public school system a "C-" grade.¹⁷⁰ "Business' general dismay with the public schools has been aggravated by the staggering and increasing

New Jersey spending \$10,062 (highest) and Utah spending \$3,419 (lowest)); *see also supra* note 160 (dispelling myth that more money spent in education produces better education). In 1994, the five North Carolina counties with the highest per pupil expenditures (mean of \$6,327) produced mean proficiency scores of 59.7% for reading and 58.9% for mathematics. *See Cline, supra* note 4, at 73. In contrast, the five lowest spending counties (mean of \$4,046) produced proficiency scores of 69.2% for reading and 68.2 % for math. *Id.* Additionally, despite the levels of spending in public schools, a recently released National Adult Literacy Survey "revealed that 90 million American adults, almost half the population, possess, at best, the most rudimentary reading and math skills." *See Sielaff, supra* note 83. "Forty to 44 million couldn't locate a single piece of information in a written passage if doing so required making an inference from the text or any background information." *Id.* "Another 50 million adults couldn't calculate the total cost of a purchase, determine the difference in price between two items, locate an intersection on a street map or enter information on a simple form." *Id.*

¹⁶⁸ *See* Michael J. Mandel et al., *Will Schools ever Get Better?*, BUS. WEEK, Apr. 17, 1995, at 64 (noting that according to Bruce Cooper of Fordham University, "[o]nly 52% of every school dollar actually gets into the classroom in a typical large school district"). In 1994, New York City spent almost \$8,000 per pupil and only \$44 dollars was budgeted for classroom materials. *Id.* In Nashville, public schools discovered "they were spending 24% of their budget on operations such as maintenance, compared with 18% for a typical large school district." *Id.*

¹⁶⁹ *See, e.g.,* Merl, *supra* note 68, at A3 (indicating critics say voucher system would destroy public schools due to voucher's effect of siphoning funds from public schools); Ed Rauchut, *School Vouchers Gain Momentum*, OMAHA WORLD HERALD, Oct. 29, 1995, at 13B (arguing against critics' claim that vouchers will divert money from public schools thereby hurting them); Stephens, *supra* note 67, at 4E (noting opponents of school vouchers claim "vouchers will divert much-needed money from public school districts that are already struggling").

¹⁷⁰ *See* Allen & McLaughlin, *supra* note 12 (citation omitted); *see also Speaker's Corner*, HERITAGE FOUND., Oct. 1990, at 2 (noting that survey by Conference Board, New York-based business group, found that "nearly one in five companies ha[d] problems finding people who can read well enough to qualify for entry-level jobs" and "[a]bout 14 percent of firms trace serious work delays and stoppages directly to illiterate workers").

cost of employee training, much of it remedial in nature."¹⁷¹ This is not surprising when one understands that the public school system graduates 700,000 students a year who cannot even read their own diplomas.¹⁷² Corporate America views the rising cost of employee training as a threat to the competitiveness of American companies and, therefore, corporations are becoming involved with the school reform movement.¹⁷³ They view vouchers as a viable way to force schools to become accountable and to tackle the managerial and structural design flaws that cause poor performance.¹⁷⁴

Critics claim that school vouchers will re-segregate the school system because only non-minority families will be able to take advantage of vouchers, thereby leaving minority children in failing public schools.¹⁷⁵ This argument is flawed for two rea-

¹⁷¹ Allen & McLaughlin, *supra* note 12.

¹⁷² See Ann M. Morrison, *Saving our Schools*, FORTUNE, Spring 1990, at 8; see also *The Record Thus Far*, 1994 DER 26 d99, Feb. 9, 1994 (BNA) (noting that "[f]ewer than two in five students in grade 12 can move beyond surface understanding of a text, make inferences or draw conclusions from what they have read").

¹⁷³ See *supra* note 12 (indicating corporate America's response to failing school system). "Corporate America's reasons for investing in education are the improvement of American competitiveness and the preservation of American democracy." Morrison, *supra* note 172, at 8. "As global competition has increased, the quality of American workers has declined. U.S. companies spend millions a year to teach employees to read—a cost Japanese competitors do not have to expend." *Id.*

¹⁷⁴ See Allen & McLaughlin, *supra* note 12. American corporations claim that just as a failing industrial giant needs restructuring if it is to turn around, American public schools need fundamental reform. *Id.* "In Ohio and Minnesota, business efforts were a pivotal force in creating broad public school choice programs for their communities." *Id.*; see *supra* notes 80-85 (indicating tremendous corporate support for privately funded school voucher programs and Milwaukee's parental choice program); Cebula & Buckman, *supra* note 80, at E1 (indicating local bank president viewed corporate cash grant to Catholic Schools was business' way of sending message to public institutions that "the business community is going to fund the most efficient, cost-beneficial program that's out there."); see also *How Real is the Improvement of our Students in School?*, Nat'l Pub. Radio, Sept. 11, 1995) (interviewing former executive of Xerox, Frank Pipp, "[schools have] way too much overhead, they're top heavy with management, ... their incentive systems are counter-productive.").

¹⁷⁵ See LIEBERMAN, *supra* note 17, at 176 (noting opponents of school choice "contend that freedom of choice would increase racial segregation among schools"); A. Phillips Brooks & Jeff South, *School-choice Proposals Worry Resegregation Critics; Statistics Show Trend of Clustering of Minorities and Low-income Students*, AUSTIN AM. STATESMAN, Apr. 9, 1995, at A1 ("Critics worry that several educational experiments the Legislature is considering in its overhaul of the Texas school system would resegregate public schools and steal away their most promising students."). Interestingly, research indicates that Texas schools are becoming more segregated naturally every year due to community clustering of minorities. *Id.* But

sons. First, it assumes that all minority children come from low-income families. Second, it assumes the public school system cannot reform and will continue to fail. If, however, a public school system responded by reducing waste and increasing its efficiency and productivity, contrary to the critics' argument, the remaining students would receive an education comparable to their private school counterparts.¹⁷⁶ Furthermore, the claimed flight of non-minorities would not occur. There would be no need for parents to remove their children because the quality of education would be as good or better than the private schools' quality of education.

Re-segregation arguments are specious, especially in light of the structure of the current voucher programs and proposals. Wisconsin's choice program provides tuition vouchers to low-income families, the majority of which are minorities, thereby providing minority families with a choice they previously did not have.¹⁷⁷ The federal proposal also provides choice for low-income families.¹⁷⁸ In fact, the amount of the voucher under the federal program could be substantially higher than Wisconsin's program and, thus could provide a greater choice for low-income families.¹⁷⁹

Supporters of school vouchers do not want the public school system to fail, nor are they giving up on the public schools.¹⁸⁰

see HENIG, *supra* note 68, at 101-16 (arguing that choice will not segregate but will maintain integration in schools); COOKSON, *supra* note 1, at 94-95 (citing report which indicated choice schools were somewhat more integrated than assigned schools and private schools, and that there is little indication of "devastating creaming effect on either the private schools or the local public schools").

¹⁷⁶ See Vise, *supra* note 159 (quoting U.S. Senator Joseph I. Lieberman that "[w]e have nothing to fear from [church-run schools] and a lot to learn from their sense of purpose and dedication").

¹⁷⁷ See *supra* notes 31-51 and accompanying text (describing Wisconsin's school choice program).

¹⁷⁸ See H.R. 1640, 104th Cong., 1st Sess. §§ 1-3 (1995) (titled act as "Low-income School Choice Demonstration Act of 1995"). The purpose of the Act "is to determine the effects on students and schools of providing financial assistance to low-income parents to enable such parents to select the public or private schools their children will attend." *Id.* at § 2. An "eligible child" is defined as any "child in grades 1 through 12 who is eligible for free or reduced price lunches under the National School Lunch Act." *Id.* § 3.

¹⁷⁹ See H.R. 1640, 104th Cong., 1st Sess. § 8 (1995) (calling for voucher amount to provide maximum degree of choice but limits maximum amount to the per-pupil expenditure for schooling by local agency); *supra* note 167 (indicating national per pupil expenditures average approximately \$5,700).

¹⁸⁰ See Moss, *supra* note 72 (quoting critic of public school system and supporter of vouchers, as stating "[t]he objective here is not to move kids out of public schools

Vouchers will provide parents of public school children with a choice in education when they determine the public school cannot get the job done. Why should students and parents be forced to remain in an ineffective and failing school? They should not have to remain there; vouchers would empower the parents with the ability to make a choice. Likewise, vouchers would give the public school system a choice—compete by becoming more efficient and productive or resist and risk losing students and funding.

CONCLUSION

In the midst of the national fury over school reform, school voucher programs have grown in popularity and are becoming the preferred approach to improve public schools. The Supreme Court has provided a narrow doorway through the Establishment Clause which would allow a well constructed school voucher proposal the chance to be implemented. The public's outcry for the opportunity to attend better schools appears to have been answered by Wisconsin and by individuals who fund private school choice programs around the nation. Congress should take notice and adopt laws making school vouchers available to all school-aged children. It appears that the Supreme Court would find such legislation constitutional.

Jo Ann Bodemer

into private schools" but that "[t]he objective is to improve public schools."); Merl, *supra* note 68, at A3 (quoting parent as stating "I don't think being in favor of vouchers means being against public schools. I just want to have options.").

